92-592

Supreme Court, U.S.
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No. _____

# Supreme Court of the United States

OCTOBER TERM, 1992

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FARM FRESH, INC.,
Petitioner,

v.

MICHELE SHAFFER *et al.*,
Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Date: October 5, 1992

## QUESTIONS PRESENTED

1. Whether counsel for Plaintiffs, in an alleged collective action against the Plaintiffs' employer under the Fair Labor Standards Act, have a disqualifying conflict of interest by virtue of the fact that counsel simultaneously serve as chief outside counsel for a labor union which is engaged in a campaign to represent the employees where the union fomented and financed the litigation for the avowed purpose of making it "prohibitively expensive" for the defendant to resist the union's organizing effort and where the union selected its own counsel to represent the Plaintiffs so that the union could control the litigation.

2. Whether the Court of Appeals erroneously reviewed the district court's finding that counsel had a disqualifying conflict of interest, *de novo*, rather than under the "clearly erroneous" standard of review.

3. Whether the Court of Appeals' *sua sponte* order directing the district court, on remand, to send notice of the Fair Labor Standards Act suit to 27,000 potential plaintiffs erroneously preempted the district court's discretion, under this Court's decision in *Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989), to determine whether this action is appropriately treated as a representative action under Section 16(b) of the Fair Labor Standards Act, and, if so, to manage the notice and joinder process.

4. Whether the Court of Appeals erroneously decided issues not properly raised on appeal.

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner Farm Fresh, Inc.,[1] Respondents Michelle Shaffer and Stephanie Brooks, and the following Respondents who filed cursory "Consents to Become a Party Plaintiff" in an action brought under the Fair Labor Standards Act:

> Lionel Alexander; Angela Andrews; Joseph Banks; Cynthia Bailey; Maria Y. Bailey; Kathy Baker; John Bane; Katherine Barnette; Kathy Baston; Victor Bell; David L. Bogart; Baron Booker; Carolyn Bottoms; Evey M. Brake; Patrice Branch; Ruben Brown; Frank W. Campbell; Glenn W. Campbell; Regina Carter; Quanda Carter; John Carver; Murray Edward Clark; Justin Cole; Floyd Harvey Copeland, III; Katheryn Council; Charles R. Craig; M. Michelle Davis; Clarence J. Dickerson; Anthony B. Ellerbe; Harold Epperson; Anthony B. Faison; Robert Ferry-Leeper; Alfretta Kay Flax; Catherine Lynn Foster; Charlene Fox; Floyd Gamby; Marilyn Gardner; James Conyer, Jr.; Edna L. Gordon; Thomas W. Graham; Marvin Greene; Daniel Edward Greer; Tony Hardie; Katie Hardy; Rhonda Harris; Harold F. Hartman, III; Richard E. Haughton; Paula Hayes; Daryll Henderson; Tammy C. Henry; Marianne Hierspiel; Grant Holcomb; Vickie L. Jiles; John A. Johnson; Dwight Jones; Margaret Jones; Cynthia R. Kirkendoll; Christopher L. Kirkland; Cheryl Koenig; Johnny Kon; Robert Lee Lindsay; Robbin R. Love; Darlene L. Mabrey; Lois J. MacPhee; Thomas Mallory; Joseph W. Manning, Jr.; Jennifer Lynn Marcou; Phil Martin, Jr.; Thurman Massenburg; Karen Matthews; Bobbie Sue Melzer; James J. Mills, Jr.; Delores Moore; Terry Nuhfer; Chris Olworth; William T. Page, Jr.; Neal

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[1] Pursuant to Rule 29.1 of the Rules of this Court, Farm Fresh states that Farm Fresh, Inc. is a wholly owned subsidiary of FF Holdings, Inc., a Delaware Corporation. While the majority of the common stock of FF Holdings, Inc. is owned by Citicorp Investments, Inc. (a wholly owned subsidiary of Citicorp, Inc.), it is not the "parent" of Farm Fresh, Inc. or FF Holdings, Inc.

Paris; Phyllis Pearson; Tonya Y. Peguese; James F. Percy; Rose M. Poole; Delores F. Prater; Shenice A. Pritchett; Robert Puchalski; Kathy Reale; Peggy Moore Reed; James C. Reed, Jr.; Rachel Robertson; Francis Robinson; Antoinette Robinson; Gale Rogers; John Charles Salldin; Christine N. Sawyer; Virginia Schnoor; Patricia G. Schoolcraft; Janathan A. Sherrod; Jaime P. Shoemaker; Angela M. Sifford; Cheryl A. Smith; Jackie Spartley; Bertha Louise Stevenson; Patricia L. Stewart; James H. Stiers; Doretha L. Stith; Angela M. Stone; Richard A. Strader; Carla R. Tory; Amy Wilding; Amy Lynn Williams; Roslyn Williams; Shannon D. Williams; Tammy C. Williams; Kay W. Willis; Deborah Wilt; Cavanaugh L. Wrim.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

FARM FRESH, INC.,
Petitioner,

v.

MICHELE SHAFFER *et al.*,
Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Farm Fresh, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on May 22, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 966 F.2d 142. The opinion of the district court on motion to reconsider the order disqualifying counsel is reported at 759 F. Supp. 1991. The remaining orders and opinions of the district court from which appeals were taken are not officially reported. However, the order entered April 22, 1991 can be found at 1991 U.S. Dist. LEXIS 8099. All relevant opinions are reprinted in the Appendix hereto.

## JURISDICTIONAL STATEMENT

The decision sought to be reviewed was issued by the United States Court of Appeals for the Fourth Circuit on May 22, 1992. The Circuit Court denied Farm Fresh's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on August 14, 1992. By order dated September 17, 1992 the Circuit Court recalled the mandate issued on August 21, 1992 and stayed its issuance until October 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## THE STATUTES AND RULES

Section 16(b) of the Fair Labor Standards Act provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall

terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection, or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 U.S.C. § 216(b) (1990).

Canon 5 of the Virginia Code of Professional Responsibility provides, in pertinent part:

DR 5 105. *Refusing to Accept or Continue Employment if the Interests of Another Client may Impair the Independent Professional Judgment of the Lawyer.* - (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Rules of the Supreme Court of Virginia, Part 6, § II, Canon 5, DR 5-105 (Michie 1991).

Canon 9 of the Virginia Code of Professional Responsibility provides:

> A lawyer should avoid even the appearance of professional impropriety.

Rules of the Supreme Court of Virginia, Part 6, § II, Canon 9 (Michie 1991).

## STATEMENT OF THE CASE

On September 6, 1990, two named Plaintiffs[2] filed a representative action under the Fair Labor Standards Act, 29 U.S.C. § 216 ("the FLSA") in the United States District Court for the Eastern District of Virginia against their employer, Farm Fresh, Inc. (hereinafter "Farm Fresh").[3] The Complaint alleged that Farm Fresh violated the minimum wage and overtime provisions of the FLSA. (App. 11-18; docket nr. 3).[4] The Complaint sought to maintain the action "on behalf of . . . all other hourly employees either then presently employed, or who at any time since September 6, 1987 have been employed by Farm Fresh." (*Id.*).

Since 1986, Farm Fresh has been the target of aggressive efforts by the United Food and Commercial Workers Union, Local 400, ("the Union" or "Local 400") to win the right to represent Farm Fresh

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[2] The initial named plaintiffs were Stephanie R. Brooks and Karen C. Matthews. On September 26, 1990 the First Amended Complaint was filed in which Michele Shaffer was added as a named plaintiff. Thereafter, and without explanation, Matthews' name no longer appeared on papers filed by the plaintiffs. Neither Matthews nor Brooks appeared for depositions or served answers to interrogatories. By order of April 15, 1991, the district court dismissed the claims of Brooks with prejudice for failure to prosecute, and no appeal from that order was taken.

[3] Federal jurisdiction was invoked under 28 U.S.C § 1331 and 1337 as well as under 29 U.S.C § 216(b).

[4] References to the Appendix in the Fourth Circuit are abbreviated "App. __." References to the Appendix hereto are cited as "Cert. Pet. App. __."

employees for purposes of collective bargaining. (App. 108-121, 239, 242-249). In April of 1990, the Union redoubled its efforts. This lawsuit was an integral part of the organizing campaign. (App. 46). Throughout the summer and early fall of 1990 professional union organizers distributed flyers to employees of Farm Fresh which urged them to join the suit and touted the benefits of union representation.[5] The Union also distributed vague and cursory forms to prospective Plaintiffs purporting to evidence their knowing consent to join "a civil action . . . to recover wages which are or may be owed. . . ." The consent forms were often provided to prospective Plaintiffs at Union organizational meetings and/or in tandem with other pro-Union literature. (App. 62 n. 8, 214-219, 233-235, 273-274, 278-279). The Union solicited responses to a questionnaire, boasted of its role in initiating and furthering the litigation, directed potential claimants to the law firm of Baptist & Wilder, the Union's chief outside counsel, and funded the lawsuit. (App. 62 n.8, 123, 172-73, 230, 252-253, 271-272). Indeed, a number of the Plaintiffs believed that the Union had initiated the lawsuit. (*See e.g.*, App. 74-75). Moreover, many of the Plaintiffs did not even meet their "chosen" counsel until shortly before they were deposed, more than five months after the lawsuit was filed. (*See e.g.*, App. 227-228, 231, 236). Eighteen of the union's consent forms were filed with the initial complaint. Thereafter, on November 26, 1990, another 110 consent forms were filed; however, among these were duplicate forms filed on behalf of three people. (App. 34 - 37, 153).

On November 20, 1990, Plaintiffs filed a Motion for Approval of Notice to similarly situated employees, seeking the permission of the district court to notify approximately 27,000 past and present Farm Fresh employees of the suit. (App. 1; docket nr. 11). By order dated December 28, 1990, the district court denied the Plaintiffs' motion,

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[5] The District Court concluded that the flyers were inflammatory and potentially misleading. (App. 36). One flyer taunted employees into joining the suit by telling them that Farm Fresh had cheated them, substantially overstating the extent of employee participation up to that point, and misstating the law by telling recipients that they had to consent to joinder in this suit if they were to recover any money. (*Id.*)

instructing the parties to continue with discovery of the 127 plaintiffs then joined in the action until such time as the district court resolved the following issues: whether the named plaintiffs were "similarly situated" to those they sought to represent within the meaning of § 16 (b) of the FLSA; whether "inflammatory and misleading" pro-Union literature, distributed by Local 400's professional organizers along with consent forms used to join the lawsuit, had "tainted this proceeding;" and, whether "the court was being used as a bargaining chip in a labor/management dispute." (Cert. Pet. App. 3-8, 3-9).

After discussing the need to settle these questions before rendering a final decision on the notice issue, the district court directed that no one thereafter "conduct any further activity to attempt to recruit additional plaintiffs in this action until further order of the court." (*Id.* at 3-9). The Court stated that it would revisit the notice issue once sufficient discovery had been conducted. (*Id.*).

On December 28, 1990, Farm Fresh moved to disqualify Plaintiffs' counsel on the grounds that Baptist & Wilder's simultaneous representation of the Plaintiffs and Local 400, at a time when Local 400 maintained an extensive involvement in the litigation as part of its organizing drive, created an impermissible conflict of interest. (App. 4; docket nr. 48). On February 21, 1991, the district court granted Farm Fresh's motion, and disqualified Baptist & Wilder from representing Plaintiffs. (Cert. Pet. App. 4-1). The district court determined that literature disseminated by the Union was misleading and inflammatory and had affected the proceeding (*Id.* at 4-6); that Baptist & Wilder's attorneys had not taken care to insure that they filed consent forms only for employees with valid claims (*Id.* at 4-16, 4-17); that the Union used the lawsuit as a tool in its organizing campaign; and that the Union's organizing goals conflicted with the plaintiffs' goal of recovering any wages due. (*Id.* at 4-13). The district court directed that the Plaintiffs "promptly seek new counsel" and report back to the court on their efforts. (*Id.* at 4-18).

On April 4, 1991, Respondent Shaffer informed the court that she had found substitute counsel. (*Id.* at 6-2). A week later, however, the attorney whom she had identified notified the court that Ms. Shaffer

had elected not to retain him. (*Id.*). By order of April 15 the court advised all Plaintiffs that "unless they appear[ed] before the court on Monday, April 22, 1991, at 9:00 a.m. and showed cause why their interests as represented plaintiffs should not be extinguished, the Court [would] strike their consent forms from the case, [and] the case [would] proceed with respect to the named plaintiffs only." (*Id.*).

Farm Fresh's counsel and Respondent Shaffer were the only attendees at the April 22 pretrial conference. Ms. Shaffer appeared *pro se*. The district court first, without prejudice, struck the consent forms of the opt-in Plaintiffs for their failure to appear before the court as directed in the April 15 order. (*Id.* at 7-1). The court then dismissed without prejudice the claims of Respondent Shaffer when she indicated her unwillingness to proceed *pro se*. (*Id.* at 7-2). On May 1, 1991, Plaintiffs noticed their appeal from this order. (App. 8; docket nr. 90).

Plaintiffs had previously noticed an appeal of the district court's December 28, 1990 order, but only to the extent that it banned "further activity to attempt to recruit additional plaintiffs . . . until further order of the court." (App. 4; docket nr. 55). Plaintiffs had also noticed, on March 22, 1991, an appeal from the district court's disqualification order. Plaintiffs and Farm Fresh filed timely briefs with the Fourth Circuit Court of Appeals, and oral argument was heard on February 3, 1992.

On May 22, 1992, a three member panel from the Fourth Circuit rendered an opinion vacating the district court's orders disqualifying plaintiffs' counsel, dismissing the opt-in plaintiffs and Shaffer, and prohibiting the Union's funding of the litigation. The Court of Appeals also *sua sponte* vacated the order staying approval of the notice to potential class members pending discovery and remanded the case "with instructions for the district court to approve a balanced notice statement and consent form for distribution to the 27,000 potential class members." (Cert. Pet. App. 1-11). Believing that the Fourth Circuit's reversal of the disqualification order was in error, being predicated on the incorrect standard of review, that the so-called funding statement and notice orders were not properly before

the court and that the reversal of the notice order was inconsistent with the authority of the district court recognized in *Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989), Farm Fresh filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on June 5, 1992. Plaintiffs filed an answer June 24, 1992. The Fourth Circuit panel denied the Petition for Rehearing on August 14, 1992.

## REASONS FOR GRANTING THE WRIT

### I. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF THIS COURT.

#### A. The District Court Correctly Found That Counsel Had A Disqualifying Conflict Of Interest.

Fed. R. Civ. P. 52(a) states: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ." In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Supreme Court admonished courts of appeals that in applying the clearly erroneous standard, they must keep in mind "that their function is not to decide factual issues *de novo*." *Id.* at 573 (citation omitted). Further, *Anderson* requires that "*[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.* Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id.* at 573-74 (citations omitted) (emphasis added). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 574.

The district court based its decision to disqualify Baptist & Wilder on its finding that an actual conflict existed between the interests of Local 400 and the Plaintiffs in this action that was likely to affect adversely the independent professional judgment of the Plaintiffs' lawyers. (App. 51-58). The district court's findings of Union involvement, conflicting interests, and adverse effect on the

representation of the Plaintiffs, all contested by Baptist & Wilder, involved factual disputes. Indeed, the record clearly established that the district court evaluated competing factual contentions to determine whether the Union was using the lawsuit to further its organizational aims; whether the inflammatory or misleading literature disseminated by the Union along with consent forms "tainted this proceeding"; and ultimately whether these and other facts created a conflict of interest which was likely to affect adversely the independent judgment of Baptist & Wilder.

The district court began with a consideration of the applicable disciplinary rule. The Virginia Code of Professional Responsibility governs the conduct of attorneys practicing before the United States District Court for the Eastern District of Virginia. Rules of the United States District Court for the Eastern District of Virginia, Rule 7(I). Canon 5 of the Code states, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." The applicable disciplinary rule is reprinted in its entirety on page 3, *supra*.

The district court recognized that the disqualification of counsel "was not a step to be taken lightly" (Cert. Pet. App. 5-5), and that it had a duty to "balance a party's right to counsel of choice with its responsibility to insure the integrity of the proceedings before it and public confidence in the integrity of the bench and bar." (*Id.* at 4-8) (citations omitted). The court concluded, however, that practical considerations revealed an actual conflict of interest likely to affect adversely the independent professional judgment of Baptist & Wilder. (*Id.* at 4-13).

The district court carefully and methodically explained how an actual conflict might manifest itself. It began by assessing the respective interests of Baptist & Wilder's two clients, Local 400 and the Plaintiffs in this action. (*Id.* at 4-10). In so doing, the court rejected Plaintiffs' contention that the Union and the employees enjoyed an alignment of interests. Noting that the employees had repeatedly rejected the Union's efforts to become their elected bargaining representative, and that the Union instigated this suit in

support of its drive to organize the Farm Fresh employees, the court found that the interests of the two groups did, in fact, conflict. (*Id.* at 4-13).

Having found that an actual conflict existed, the district court addressed the issue of whether that conflict was likely to affect adversely the independent professional judgment of the lawyers involved. The court concluded that not only was it likely to do so, but that the conflict may have already affected the lawyers' judgment. In the words of the district court,

> [T]he Union's direct involvement in the case has made the possibility into a likelihood, if not an actuality. The Union is not just another client for the firm; the Union is the party that brought the case to the firm's doorstep, the party who is paying the costs of the lawsuit, a party that stands to gain if the lawsuit is successful, the party that takes credit for the lawsuit, and the party that even a named plaintiff apparently considers responsible for the lawsuit. (Citation omitted). These factors make it likely that the attorneys will be subject to any conflicts that exist between the Union's interests and the plaintiffs'.

(*Id.* at 4-9).

The district court identified a number of examples of how the conflicting interests of the Union and Plaintiffs were likely to impair the judgment of Baptist & Wilder. One example proffered by the district court and noted by the Circuit Court was that while the Union would gain from a verdict for the Plaintiffs, the Union might not favor a quick and quiet settlement of the suit which would deprive it of sought-after publicity. (*Id.* at 4-10, 4-11). This might, in turn, cause the attorneys at Baptist & Wilder to dismiss the possibility of such a settlement altogether. (*Id.*).

On September 6, 1989 William H. Wynn, President of Local 400's parent organization, the United Food and Commercial Workers International Union ("UFCW"), delivered a speech to the Connecticut AFL-CIO convention. In his speech, Mr. Wynn articulated the

organizing strategies of the UFCW and suggested them as a paradigm of new and improved techniques, largely eschewing the procedures established by Congress in the Labor Management Relations Act, 29 U.S.C. § 141 *et seq*. He stated in pertinent part,

> Therefore, the UFCW's first objective in organizing is to neutralize employer opposition.
>
> How?
>
> By making it prohibitively expensive for companies to fight their employees' desire to organize
>
> * * * *
>
> The weapons we use include the laws to protect workers that labor played a major role in enacting.
>
> Wage and Hour laws.
>
> * * * *
>
> The third reason why the UFCW likes to handle these cases with its own attorneys and staff is:
>
> Control.
>
> The government might settle a case for pennies on the dollar.
>
> Even worse, the workers could lose the leverage they need to obtain their real goal — a union contract.
>
> In the Mississippi case I mentioned, the settlement included cash, paid vacations . . . a first for many of the workers . . . a change in the company's practices for the future, . . . *and* a union contract. [Ellipses and emphasis in original.]

(Speech at 6-9).[6]

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[6] The text of the speech was made part of the record on appeal by order of the district court dated March 9, 1992.

The union's avowed tactic of using expensive federal litigation for the primary purpose of weakening employer resistance to its organizing drives underscores the correctness of the district court's finding that the Union's institutional interests conflicted with the Plaintiffs' sole interest in recovering wages allegedly due.[7]

The district court recognized that Plaintiffs' counsel's failure to consider these conflicting interests, and their failure to disclose the effects of that conflict to the Plaintiffs, showed that their judgment may have already been impaired by their concurrent representation of the Union and the Plaintiffs.[8] (Cert. Pet. App. 4-11, 4-12).

The district court added that Baptist & Wilder had allowed Union organizers to distribute inflammatory and misleading pro-Union literature in combination with the consent forms used to join in this suit. (*Id.* at 4-16). Further, the firm failed to undertake an adequate investigation into the validity of the individual claims of each Plaintiff who filed a consent. (*Id.*). The combination of these factors, found the court, showed that the firm's judgment "may have already been adversely affected by their relationship with the Union." (*Id.* at 4-17).

In addition to finding an actual conflict of interest likely to impair the independent professional judgment of the attorneys at Baptist & Wilder, the district court found that the relationship between Baptist & Wilder, Local 400 and the Plaintiffs "creat[ed] the impression that the Union [could] use the Court as a tool in its organizing effort," and that Baptist & Wilder's contribution to this impression

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[7] For example, as a result of the Union's expressed interest in maximizing the expense of the litigation to Farm Fresh, its counsel (and by its reference, counsel for the plaintiffs) could make discovery and other strategic decisions with the purpose and effect of prolonging the litigation. Such decisions would be contrary to the Plaintiffs' interests in an early result and in working for a prosperous and growing employer. Yet the real purpose of counsel's decisions would be difficult or impossible to ascertain.

[8] The district court also noted that by funding the litigation the Union held the power to influence its course. (Cert. Pet. App. 4-12, 4-13).

created an appearance of impropriety which also justified their disqualification. (*Id.* at 4-16, 4-17). Specifically, the district court found that Baptist & Wilder should not have allowed the Union to play such a dominant role in the early stages of this litigation, and should not have acquiesced in the Union's distribution of inflammatory and misleading campaign propaganda along with consent forms. (*Id.*). By assisting the Union in providing an economic benefit to employees during the course of an organizing campaign, Baptist & Wilder created the appearance of impropriety which undermines public confidence in the integrity of the bench and bar. *See* Rules of the Supreme Court of Virginia, Part 6, § II, Canon 9 (Michie 1991); *see also Mailing Services, Inc.*, 293 NLRB 565 (1989); *Flatbush Manner Care*, 287 NLRB 457 (1987); *General Cable Corp.*, 170 NLRB 1682 (1968).

Finding actual conflicts likely to impair the lawyers' independent professional judgment, and a relationship with the Union which created the appearance of impropriety, the district court held that the concurrent representation of Local 400 and the Plaintiffs mandated the disqualification of Baptist & Wilder pursuant to DR 5-105 and Canon 9. (Cert. Pet. App. 4-17, 4-18).[9]

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[9] In a case that is analogous to the case at bar in principle, the District Court for the Southern District of New York found that disqualification was proper. In *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391 (S.D.N.Y. 1986), *appeal dismissed* 833 F.2d 1002 (2d Cir. 1986), *cert. denied*, 481 U.S. 1024 (1987), a group of employees sued *inter alia*, their present or former union in a Rule 23 action for a violation of its duty of fair representation. The court found that by permitting an organization controlled by a rival union to fund the litigation, Plaintiffs' counsel had created a conflict of interest which rendered them unsuitable to represent the class. The court rejected Plaintiffs' counsel's assertions that the third party would "assume an impartial stance . . .[and] have no strategic input" to the prosecution of the action. *Id.*, at 396. The court explained: "[T]he Joint Board, as holder of the purse strings, will enjoy considerable, inappropriate control over this litigation simply because it is capable of withdrawing financing at any time. This threat, or even the possibility of such a threat, necessarily would compromise the independence of class counsel or, at a minimum, influence counsel to consider serving the policies of [the union supported by the Joint Board] as well as or instead of those of the class they purport to represent." *Id.*

### B. The Court Of Appeals Applied The Incorrect Standard Of Review To The District Court's Findings Of Fact.

The Appeals Court erroneously reviewed *de novo* the district court's findings underlying its order of disqualification. (Cert. Pet. App. 1-7). The standard of review of an order disqualifying counsel adopted by the Fourth Circuit in prior decisions had turned on whether the court was faced with a factual dispute. If presented with a purely legal issue on appeal, the court was to "determine[] whether the District Court's disqualification order was predicated upon a proper understanding of applicable ethical principles." *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir.) (citation omitted), *cert. denied*, 439 U.S. 821 (1978); *Richmond Hilton Assocs. v. Richmond*, 690 F.2d 1086, 1088 (4th Cir. 1982). On the other hand, if unsettled facts survived to appeal, the court would defer to the district court's findings of fact, and review the order of disqualification for abuse of discretion only. *Id.*

In the instant case, however, the Court of Appeals ignored the district court's resolution of the factual disputes, and opined, "[w]e review a district court order disqualifying counsel for a conflict of interest *de novo*." (Cert. Pet. App. 1-7). Reviewing the district court's action, the Court of Appeals evaluated *de novo* the factual evidence presented before the district court and concluded, contrary to the lower court, that a conflict of interest did not exist. (*Id.* at 1-8, 1-9.)[10]

The Circuit Court's decision to ignore the district court's resolution of factual disputes flies in the face of the rule set forth in *Anderson v. Bessemer City*, *supra*. In *Anderson*, this Court made it clear that an appellate court is neither entitled nor empowered to reverse the trial court because, had it been sitting as the trier of fact, the Court of Appeals would have weighed the evidence differently. 470 U.S. at 573-74. Rather, the appellate court must accept all plausible inferences drawn by the district

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[10] The Court of Appeals failed even to consider the district court's alternative ground for disqualification, the appearance of impropriety.

court from the evidence considered, and accept its findings unless they are clearly erroneous. The Court of Appeals failed to do this in the instant case, making the reversal of the disqualification order improper.

## II. THE COURT OF APPEALS ERRONEOUSLY PRE-EMPTED THE DISCRETIONARY AUTHORITY OF THE DISTRICT COURT WHEN IT ORDERED THAT NOTICE OF THE LAWSUIT BE SENT TO MEMBERS OF THE PROPOSED CLASS.

### A. The Court Of Appeals Summarily Vacated The District Court's Notice Order Without Finding An Abuse Of Discretion.

On appeal, the Plaintiffs challenged what they characterized as the district court's "complete ban" on communications with potential opt-in plaintiffs. They did not, however, raise as an issue on appeal the district court's conditional denial of their motion for notice. (*See* Plaintiffs' Brief on Appeal to the United States Court of Appeals for the Fourth Circuit, at 1). In fact, Plaintiffs implied that a district court decision limited to the propriety of notice would have been proper. (*Id.* at 34-35).

Nonetheless, after vacating the district court's Disqualification Order, the Court of Appeals *sua sponte* turned to the issue of the district court's conditional denial of notice and stated:

> We review for an abuse of discretion the district court's Notice Order, which prohibited Shaffer from contacting potential class members. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 169-70 (1989) (quotation and footnote omitted).
>
> Because we have concluded that neither the disqualification of Baptist & Wilder nor the prohibition on Union funding of this litigation was warranted at this time, we can identify no reason for continuing the district court's ban on communication between Shaffer and potential class members.

(Cert. Pet. App. 1-10).

While the Court of Appeals alluded to abuse of discretion as the applicable standard of review of the district court's Notice Order, in fact, the opinion indicates that reversal of the Notice Order followed *a fortiori* the reversal of the Disqualification Order. Thus, the Court of Appeals failed to consider the three factors upon which the district court based its conditional denial of notice. (*See Id.* at 3-8, 3-9).

Farm Fresh believes that in reviewing the district court's conditional denial of notice, the Court of Appeals improperly addressed an issue not properly raised on appeal. Furthermore, in resolving that issue, the Court of Appeals completely emasculated the responsibility of the district court in the first instance to manage the notice and joinder process of a § 16(b) collective action. This oversight resulted in a significant, and unwarranted, intrusion into an area which this Court has reserved to the discretion of the district court.

### B. Section 16(b) Of The FLSA Vests Trial Courts With Broad Discretion To Manage The Opt-In Process Of A Collective Action.

In *Hoffman-LaRoche*, this Court addressed "the narrow question of whether . . . district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to the potential members of the class on whose behalf the collective action has been brought." 493 U.S. at 169. Resolving a split among the circuits, the Court held "that district courts have discretion, in appropriate cases, to implement [§ 16(b)] . . . by facilitating notice to potential plaintiffs." *Id.*[11]

[11] Lower courts interpreting this decision have held that the discretion to facilitate notice necessarily includes the discretion to deny it. *See Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264 (D. Minn. 1991) (to obtain court authorized notice in ADEA action, plaintiffs must establish "a colorable basis . . . that a class of 'similarly situated' plaintiffs exists"); *Adams v. United States*, 21 Cl. Ct. 795 (1990) (motion for court approved notice in FLSA action denied because, *inter alia*, class recovery is sought on four distinct theories); *Shushan v. University of Colorado*, 132 F.R.D. 263 (D. Col. 1990) (motion for court approved notice in an ADEA action denied where plaintiffs failed to show that they are capable of representing a definable class); *Bennett v. Soo Line Railroad Co.*, 87 C 8894, 1990 U.S. Dist. LEXIS 2103 (N.D. Ill. February 20, 1990) (motion for court approval of notice in ADEA action denied where plaintiff waited over two years after filing suit to move for notice).

*Hoffman-LaRoche* established the authority of district courts to manage the notice phase of a collective action, and provided them with broad guidelines to aid in the exercise of their discretion. In the words of this Court:

> Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the Federal Rules of Civil Procedure. See Fed. Rule Civ. Proc. 83. It follows that, once [a collective] action is filed, the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way.

*Id.* at 170.

The district court below exercised its discretion to deny conditionally Plaintiffs' motion for court approved notice as premature. (Cert. Pet. App. 3-9). As a part of its plan to manage the notice and joinder process "in an efficient and proper way," the district court ordered all involved to cease temporarily their attempts to recruit additional Plaintiffs, and to continue with the discovery of the substantial sample of Plaintiffs already joined in the suit. (*Id.*). The district court explained that there were sufficient Plaintiffs before it to permit resolution of the threshold issues bearing on the propriety of a § 16(b) collective action, and that once discovery had produced satisfactory answers to its threshold concerns, it would revisit the issue of notice to potential class members. (*Id.*). The district court's reliance on *Hoffman-LaRoche* to fashion this "orderly [and] sensible" approach to the notice question was clearly justified, particularly since the potential class included approximately 27,000 people.

The Court of Appeals, however, overstated the scope of the district court's order by mischaracterizing it as a "ban on communications" with the purported class, when in fact the restrictions imposed were more narrowly tailored. The district court found that the Union's distribution of consent forms along with misleading campaign literature might have "tainted [the] proceeding." (*Id.* at 3-8).

The district court acknowledged the Union's freedom to disseminate "inflammatory and potentially misleading" pro-union literature in an organizing campaign, but correctly stated that,

> "[such literature] is not, however, an appropriate part of a judicial proceeding. Potential parties should consider their decisions to join this action, or any legal action, in a calm and serious manner, and with proper regard for the gravity with which the Court considers their signed statements. They should not be swayed away from the facts as they know them, by the exhortations of Union officers with interests that may include more that the simple concern that Farm Fresh adhere to the provisions of the FLSA."

(*Id.* at 3-6). As a result of Union solicitations, the district court was properly concerned that the 125 opt-in Plaintiffs might have joined the suit in reliance on misinformation, and that potential class members could also be improperly influenced by misleading material. (*Id.* at 3-8). Therefore, in addition to denying notice until it could determine whether a collective action was warranted, the district court halted Union solicitation of new Plaintiffs until it could weigh the impact of campaign literature on those already joined. (*Id.* at 3-9).

This restriction on recruitment served as a means of enforcing the court's conditional denial of notice. The district court declined to authorize the sending of formal notice to 27,000 present and former Farm Fresh employees primarily because there had been no showing that those sought to be grouped in this suit were similarly situated within the meaning of § 16(b) of the Act. (*Id.* at 3-8, 3-9). As a corollary, the district court also ordered that no additional plaintiffs be informally recruited until the threshold issues were resolved. (*Id.* at 3-9).

### C. The District Court's Conditional Denial Of Notice Was Not An Abuse Of Discretion.

The denial of notice to the potential class served as an important component of the district court's plan to manage the purported collective action. By denying further notice after 125 consent Plaintiffs had joined

the suit, the district court forced the parties to focus on the discovery of the individuals already before the court so that the court might evaluate whether the action was one appropriately maintained in a collective fashion.

This reasoning, not addressed by the Court of Appeals, can not be said to be an abuse of discretion. *Compare Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). In *Gulf Oil* this Court found that a district court abused its discretion by prohibiting all communications between the named plaintiffs and actual or potential class members under the unique set of facts present in that Rule 23 action.

In *Gulf Oil* the employer had entered into a conciliation agreement with the EEOC by which it agreed to pay backpay to several hundred workers in settlement of all of their discrimination claims. 452 U.S. at 91. Shortly thereafter a class action suit was filed on behalf of many of the workers covered by the conciliation agreement. *Id.* at 92. The employer wanted to continue with the conciliation process by sending offers of backpay in exchange for releases to all covered employees. *Id.* at 93. The named plaintiffs, on the other hand, wanted to advise the employees of the pending action before they waived their right to sue by signing a settlement. *Id.* Without making any findings of fact, and without writing an explanatory opinion, the district court ordered a complete ban on communications between parties and the potential or actual class members. *Id.* at 94-96. This Court affirmed the Fifth Circuit's reversal of the trial court by holding that the order had been an abuse of discretion. *Id.* at 103.

*Gulf Oil*, however, does not stand for the proposition that a district court may never restrict communications between the named plaintiffs and potential class members in a representative action. *See Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, at 563 n.4 (4th Cir. 1985). Nor does it support the Circuit Court's preemption of the trial court's discretionary authority to determine whether a collective action is appropriate and to manage the notice and joinder process of such an action. In *Gulf Oil*, the Court emphasized that pursuant to Rule 23, "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Id.* at 100. This was so, explained the Court, because of the potential for abuse inherent in the class action device. *Id.* The Court

specifically identified as abuses worthy of concern, "stirring up" litigation, and "unapproved communications to class members that misrepresent the status or effect of the pending action. . . ." *Id.* at n.11., n.12 (quoting *Waldo v. Lakeshores Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977), *appealed dismissed*, 579 F.2d 642 (5th Cir. 1978)). The district court found both dangers present in the instant case. (App. 34-39).

On the other hand, the errors identified by this Court in *Gulf Oil* are absent in this case, rendering the holding clearly distinguishable on several grounds. First, unlike the order in *Gulf Oil*, the district court's denial of notice in the instant case was temporary in nature, served as a component of an overall plan for the sensible management of the notice and joinder phases of the suit, and was narrowly tailored to impose only a restriction on solicitation of additional plaintiffs pending further discovery. (App. 40-41).

Second, the temporary ban on recruitment of additional plaintiffs in this action does not threaten the potential plaintiffs with the same harm as that faced by the employees in *Gulf Oil*. Without notice of the lawsuit filed on their behalf in *Gulf Oil*, the employees could be expected to sign a conciliation agreement by virtue of which they would waive their right to sue the employer. In this case, the employees are faced with no such choice. Communication with the potential class members was not needed to prevent the uninformed waiver of claims, as each person remained free to pursue his or her own claim individually.

Third, in this case, prior to issuing its order, the district court found that Union solicitations of prospective plaintiffs were "inflammatory [and] misleading" and, therefore, not "an appropriate part of a judicial proceeding." (App. 36-37, 39). These were precisely the type of abuses inherent in the class action device specifically identified by this Court in *Gulf Oil*. 452 U.S. at 100 n.11, n.12.

Fourth, the order in this case allowed the named and opt-in Plaintiffs then joined in the suit to communicate among themselves, with their attorneys or the Union. (App. 40-41). Communications with employee witnesses was also permitted, provided it did not include a solicitation to

opt-in to the case. The order in *Gulf Oil*, on the other hand, permitted communication only among the named plaintiffs.[12] 452 U.S. at 94-97.

## CONCLUSION

Union exploitation of federal litigation in support of organizing aims is an important issue in today's labor relations arena, and one which calls for guidance from the Supreme Court. Pursuant to UFCW President Wynn's speech, that union has sponsored FLSA suits which are presently pending in North Carolina, *Letford, et al. v. Food Lion, Inc.*, Case No. A-C-91-194 (W.D.N.C.) and *McLawhon, et al. v. Food Lion, Inc.*, Case No. 91-133-CIV-45 (E.D.N.C.); South Carolina, *Scott, et al. v. Food Lion, Inc.*, Case No. 2:92-0992-01 (D. S.C.); Tennessee, *Millington et al. v. Food Lion, Inc.*, Case No. 3-92-276 (E.D. Tenn.); Florida, *Henderson et al. v. Food Lion, Inc.*, Case No. 92-40174-WS (N.D. Fla.) and Washington, *UFCW Local 1001 and 367 et al. v. Nordstrom, Inc.*, Case No. 90-2-04282-1 (Wash. Sup. Ct., King Cty.).

In the instant case, the district court weighed competing evidence and found that Union domination of the suit created an appearance of impropriety and an actual conflict of interest for the plaintiffs' counsel. The Court of Appeals erred in reversing these findings upon reviewing them *de novo*, rather than under the clearly erroneous standard established by Fed. R. Civ. P. 52(a) and confirmed by this Court in *Anderson*, *supra*.

The Court of Appeals also erred by ordering that notice of the action be sent to putative class members without finding that the suit is one maintainable under § 16(b) of the Act, or allowing the district court the opportunity to make that determination. This ruling constitutes an impermissible infringement on the discretionary authority of the district courts to manage the notice and joinder process of § 16(b) collective actions, as explained by this Court in *Hoffman-LaRoche*, *supra*.

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[12] Also, as a result of the extensive publicity given this lawsuit by Local 400, it is likely that most members of the proposed class were already aware of the action. Since its filing in September 1990, Local 400 has publicized this suit in newspaper articles, mailing flyers, handouts and face to face meetings with hundreds of past and present Farm Fresh workers. (App. 113, 116, 119, 152-155, 223, 233-236, 248-249).

So that this Court might fully consider these pressing concerns, Farm Fresh urges that the Court grant its petition for a writ of certiorari.

Respectfully submitted,

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PUBLISHED

# UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

Michelle Shaffer; Lionel Alexander; Angela Andrews; Joseph Banks; Cynthia Bailey; Maria Y. Bailey; Kathy Baker; John Bane; Katherine Barnette; Kathy Baston; Victor Bell; David L. Bogart; Baron Booker; Carolyn Bottoms; Evey M. Brake; Patrice Branch; Ruben Brown; Frank W. Campbell; Glenn W. Campbell; Regina Carter; Quanda Carter; John Carver; Murray Edward Clark; Justin Cole; Floyd Harvey Copeland, III; Katheryn Council; Charles R. Craig; M. Michelle Davis; Clarence J. Dickerson; Anthony B. Ellerbe; Harold Epperson; Anthony B. Faison; Robert Ferry-Leeper; Alfretta Kay Flax; Catherine Lynn Foster; Charlene Fox; Floyd Gamby; Marilyn Gardner; James Gonyer, Jr.; Edna L. Gordon; Thomas W. Graham; Marvin Greene; Daniel Edward Greer; Tony Hardie; Katie Hardy; Rhonda Harris; Harold F. Hartman, III; Richard E. Haughton; Paula Hayes; Daryll Henderson; Tammy C. Henry; Marianne Hierspiel; Grant Holcomb; Vickie L. Jiles; John A. Johnson; Dwight Jones; Margaret Jones; Cynthia R. Kirkendoll; Christopher L. Kirkland; Cheryl Koenig; Johnny Kon; Robert Lee Lindsay; Robbin R. Love; Darlene L. Mabrey; Lois J. MacPhee; Thomas Mallory; Joseph W. Manning, Jr.; Jennifer Lynn Marcou; Phil Martin, Jr.; Thurman Massenburg; Karen Matthews; Bobbie Sue Melzer; James J. Mills, Jr.; Delores Moore; Terry Nuhfer; Chris Olworth; William T. Page, Jr.; Neal Paris; Phyllis Pearson; Tonya Y. Peguese; James F. Percy; Rose M. Poole; Delores F. Prater; Shenice A. Pritchett;

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Robert Puchalski; Kathy Reale; Peggy Moore Reed; James C. Reed, Jr.; Rachel Robertson; Francis Robinson; Antoinette Robinson; Gale Rogers; John Charles Salldin; Christine N. Sawyer; Virginia Schnoor; Patricia G. Schoolcraft; Janathan A. Sherrod; Jaime P. Shoemaker; Angela M. Sifford; Cheryl A. Smith; Jackie Spartley; Bertha Louise Stevenson; Patricia L. Stewart; James H. Stiers; Doretha L. Stith; Angela M. Stone; Richard A. Strader; Carla R. Tory; Amy Wilding; Amy Lynn Williams; Roslyn Williams; Shannon D. Williams; Tammy C. Williams; Kay W. Willis; Deborah Wilt; Barry K. Wood; Sharon Wormley; Cavanaugh L. Wrim,

*Plaintiffs-Appellants,*

and

Stephanie R. Brooks,

*Plaintiff,*

v.

Farm Fresh, Incorporated,

*Defendant-Appellee.*

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
J. Calvitt Clarke, Jr., Senior District Judge.
(CA-90-1607-N)

Argued: February 3, 1992

Decided: May 22, 1992

Before PHILLIPS and MURNAGHAN, Circuit Judges, and OSTEEN, United States District Judge for the Middle District of North Carolina, sitting by designation.

Vacated and remanded by published opinion, Judge Phillips wrote the opinion, in which Judge Murnaghan and Judge Osteen joined.

## COUNSEL

**ARGUED:** Laurence Gold, Washington, D.C., for Appellants. Thomas Joseph Flaherty, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee. **ON BRIEF:** James B. Coppess, Washington, D.C., for Appellants. Michael P. Oates, HUNTON & WILLIAMS, Richmond, Virginia; A. W. VanderMeer, Jr., Sharon S. Goodwyn, HUNTON & WILLIAMS, Norfolk, Virginia, for Appellee.

## OPINION

PHILLIPS, Circuit Judge:

Michelle Shaffer appeals the judgment of the district court dismissing without prejudice her action against Farm Fresh under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (FLSA). Shaffer, on behalf of herself and 125 consenting class members, challenges the following district court rulings: (1) an order disqualifying Shaffer's counsel, Baptiste & Wilder, under Virginia's conflict of interest rule (Disqualification Order); (2) a statement made by the district court during a hearing that Local 400 of the United Food and Commercial Workers could no longer pay Shaffer's litigation costs (Funding Statement); (3) an order denying Shaffer's request to notify potential class members (Notice Order); and (4) an order dismissing without prejudice Shaffer's action and striking without prejudice the consents of 125 class members (Dismissal Order). We conclude that disqualification was not warranted and that in consequence the district court's further rulings, including dismissal of the action, cannot stand. Accordingly, we reverse on all points and remand for further proceedings.

I

Shaffer, on behalf of 125 present and former employees of Farm Fresh, brought this action against Farm Fresh under § 16(b) of the FLSA, 29 U.S.C. § 216(b). Section 16(b) enables aggrieved employees to obtain class relief against employers, provided each class member consents to be bound by the judgment. Shaffer alleged that Farm Fresh violated the FLSA by requiring employees to work "off the clock" after employees have "punched out," failing to pay employees overtime wages, requiring employees to work through their breaks without compensation, altering employee time records, and threatened employees who joined this lawsuit.

The action originated in contacts between Farm Fresh employees and representatives of Local 400 of the United Food and Commercial Workers (Union). Since 1986, the Union has conducted an organizing campaign to become the exclusive bargaining representative of Farm Fresh employees under the National Labor Relations Act (NLRA), 29 U.S.C. § 141, *et seq*. Farm Fresh employees and Union representatives discussed Farm Fresh's business practices, and the Union urged its primary outside counsel, Baptiste & Wilder, to represent the employees. The Union agreed to pay all litigation costs, with the expectation that if Shaffer prevailed, the court would order Farm Fresh to pay fees under § 16(b).

The action was filed in September of 1990, on behalf of Farm Fresh employees Stephanie Brooks and Michelle Shaffer and a class of similarly situated employees.[1] With the help of the Union, Baptiste & Wilder circulated questionnaires and consent forms to Farm Fresh employees. Along with these materials, the Union distributed flyers

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[1] Shaffer originally filed her complaint with the Department of Labor. The Department of Labor advised her to obtain a private attorney. She approached five or six attorneys without success, and when she approached the Union for assistance, the Union told her to contact Baptiste & Wilder.

discussing the benefits of Union representation and the Union's involvement in the suit.[2]

After securing 125 consents, Shaffer moved for court approval of a notice to be sent to a class of 27,000 potential class members. In its Notice Order, the district court denied the request and ordered "that neither the parties nor the Union, nor anyone acting for them, in their interest, or at their behest, conduct any further activity to attempt to recruit additional plaintiffs in this action until further order of the Court." The court took issue with the Union's involvement in securing the first 125 consents, suggesting that the Union may have misled some of the opt-in plaintiffs with its "inflammatory and misleading" flyers. The court also expressed concern that the Union might be pursuing the FLSA action to further its organizational drive.

Farm Fresh later moved to disqualify Baptiste & Wilder, arguing that the firm's representation of the Union and Shaffer created a conflict of interest which would deprive Shaffer of adequate representation. The district court entered its Disqualification Order granting the motion in February 1991. The court characterized the lawsuit as

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[2] One flyer read in part:

Do you have this problem - lots of overtime, with little to show for it on your paycheck?

You KNOW what your problem is: You need a UNION.

Another flyer, signed by the President of the Union, read in part:

You should know by now that a lawsuit has been filed on behalf of Farm Fresh employees to get back the money Farm Fresh has cheated you out of by making you work off the clock.

Don't be fooled and don't be intimidated by Farm Fresh promises and Farm Fresh threats. Hundreds of employees have already come forward to be plaintiffs in this lawsuit and the number continues to grow.

REMEMBER — YOU HAVE TO SIGN A CONSENT FORM, IF YOU HOPE TO GET BACK THE MONEY THAT FARM FRESH OWES YOU IF YOU'VE WORKED OFF THE CLOCK.

The Union has already made a difference — and this is just the beginning.

an attempt by the Union to garner support for its organizational drive and found that Baptiste & Wilder's multiple representation violated DR 5-105 of the Virginia Code of Professional Responsibility, which governs conduct of attorneys practicing before the District Court for the Eastern District of Virginia.

The court recognized that, while the Union and the Farm Fresh employees share an interest in recovering lost wages, the Union may have additional motives. The court hypothesized a potential conflict if, for instance, Farm Fresh proposed a quick, confidential settlement. While the settlement might be favorable to the employees, a quiet settlement would undermine the Union's interest in publicizing a successful outcome. As a result of its association with Baptiste & Wilder and its financial support of the litigation, the Union could shorten or lengthen the case to coincide with the timing of its organizational drive.

Following a hearing in April 1991, the court expressly prohibited the Union from financing the lawsuit. The court entered an order giving Shaffer, Brooks, and the class members one week to secure an attorney willing to accept the case without the Union as a funding source. When the employees failed to do so and Shaffer refused to proceed *pro se*, the court entered the Dismissal Order, dismissing Shaffer's claim without prejudice, dismissing Brooks' claim with prejudice,[3] and striking without prejudice the opt-in consents filed by the class members. This appeal followed.

## II

Because the district court rulings depend on the finding of a conflict of interest in the Disqualification Order, we address that order first. We will then consider the Funding Statement, the Notice Order, and the Dismissal Order.

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[3] Brooks' claim was dismissed because she failed to appear at a scheduled deposition and she failed to respond to the district court's disqualification order. She is not appealing the dismissal.

A

We review a district court order disqualifying counsel for a conflict of interest *de novo*. *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir. 1978). We must determine whether the district court's disqualification order was predicated upon a proper application of applicable ethical principles. *Id.*

Virginia's Disciplinary Rule 5-105(B) provides:

> A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client. . . .

Rules of the Supreme Court of Virginia, Part 6, § II, Canon 5, DR 5-105 (Michie 1991). We have held that disqualification of a litigant's chosen counsel for violation of an ethical canon such as Virginia's DR 5-105(B) may not be rested on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur. *Aetna*, 570 F.2d at 1200-1202. Although this canon proscribes multiple employment not only when counsel's exercise of independent professional judgment "will be" adversely affected, but when it is "likely to be," some stronger objective indicator — even of "likelihood" — than simple judicial intuition is needed to warrant the drastic step of disqualification of counsel. How strong in a particular case is of course a matter of judgment, but we have no doubt that the indicators here are not sufficiently strong; indeed, we see none other than the ever-present threat of human cupidity in all the affairs of life. That obviously cannot suffice.

Certainly the district court pointed to no objective indicators that the chain of events it hypothesized *might* occur were even incipiently underway, or would "likely" occur. The scenario posited by the court instead had simply to assume the complete unfolding of a series of discrete events, no one of which could be more than the basis of speculation at this point: an offer of settlement favorable to plaintiffs

which Farm Fresh required be kept confidential; failure of the Union by that time to have organized the Farm Fresh employees; a decision by the Union to influence counsel to reject the favorable settlement in order to further Union interests; and a decision by counsel to default on their ethical obligation in response.

This is too attenuated a basis upon which to disqualify counsel. Not only are positive indicators even of the "likely" development of the hypothesized conflict of interest weak or non-existent, powerful safeguards against its actual development manifestly are present. First off, there is the ethical obligation of counsel. That has now been highlighted by Farm Fresh's motion to disqualify which has prompted specific assurances in response. That obligation's force may not be discounted. Beyond that lies the deterrent effect of sanctions — also highlighted by the proceeding — available were counsel nevertheless ever tempted at the Union's insistence deliberately to delay settlement at the expense of its litigation clients. Although a court may not use the threat of sanctions directly to force settlement of a case, *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985), § 1927 sanctions may be appropriate against counsel who needlessly and vexatiously "multiples a proceeding" by rejecting a settlement offer that would afford complete relief to his client. *Kline v. Wolf*, 702 F.2d 400, 405 (2d Cir. 1983). Particularly here, with the fat of possible specific ethical misconduct now formally in the fire, it is hard to imagine that it would occur — even if, as we do not suggest, there were any predisposition in that direction.

These are practical considerations that we must take into account, along with a party's ability to secure alternative representation, in assessing the propriety of disqualifying counsel on "likely" conflict grounds. *Aetna*, 570 F.2d at 1200-02. The drastic nature of disqualification requires that courts avoid overly-mechanical adherence to disciplinary canons at the expense of litigants' rights freely to choose their counsel; and that they always remain mindful of the opposing possibility of misuse of disqualification motions for strategic reasons. *See Woods v. Covington Bank*, 537 F.2d 804, 813 (5th Cir. 1976).

Farm Fresh has made, and the district court has accepted as at least a likelihood, the suggestion that counsel might engage in a most egregious, specific form of unethical conduct. For the reasons above given, we conclude that even the likelihood of its actual occurrence is much too speculative on the present record to warrant disqualification. The question of actual or more imminently threatened ethical misconduct resulting from multiple employment of course remains always subject to inquiry.

**B**

During the April 1991 hearing the district court stated that "under the rules of the Court . . . the union can no longer finance this litigation." (App. 78). While the court did not incorporate this in a formal order, the parties both treat the court's Funding Statement as if it were. To the extent that the Funding Statement could be considered part of a binding order, we reverse. Because the district court based the funding prohibition as well as its disqualification order on an interpretation and application of Virginia's canons of professional responsibility, we also review that ruling *de novo*.

We have earlier concluded that Baptiste & Wilder's joint representation of the Union and the Farm Fresh employees could not properly be found on the present record "likely" to cause those counsel to subvert their litigation clients' interests in deference to union influence. For the same reasons, we conclude that it could not properly be found on the present record that the union's contemporaneous organizing drive is "likely" to result in a subversion of Baptiste & Wilder's fair and effective representation of the Farm Fresh employees.[4] Therefore, we reverse the district court's Funding Statement to the extent it was intended to operate as an injunction against Shaffer's use of Union funding for the litigation.

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[4] In view of this conclusion, we need not reach the question whether the Union has a protected first amendment right to fund litigation under the line of cases including *Mine Workers v. Illinois Bar*, 389 U.S. 217 (1967) and *NAACP v. Button*, 371 U.S. 415 (1963).

C

We review for an abuse of discretion the district court's Notice Order, which prohibited Shaffer from contacting potential class members. *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169-70 (1989) ("district courts have discretion, in appropriate cases, to implement § 216(b) . . . by facilitating notice to potential plaintiffs.").[5]

Because we have concluded that neither the disqualification of Baptiste & Wilder nor the prohibition on Union funding of this litigation was warranted at this time, we can identify no reason for continuing the district court's ban on communication between Shaffer and potential class members. The benefits of the class action provisions of § 16(b) "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* at 170. Accordingly, we vacate the district court's Notice Order and remand for lower court approval of an appropriate notice statement and consent form.

D

The claims of Shaffer and the 125 opt-in class members were dismissed because Shaffer was unable to secure alternative counsel and she was unwilling to proceed *pro se*. That basis for dismissal has now been voided by our conclusion that Shaffer's chosen counsel could not properly be disqualified. We therefore vacate the district court's Dismissal Order with respect to Shaffer and the plaintiff class. The order of course stands as to Brooks, who did not appeal.

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[5] *Hoffman* was brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. However, since the ADEA incorporates § 16(b) of the FLSA into its enforcement scheme, the same rules govern judicial management of class actions under both statutes.

## III

For the foregoing reasons, we vacate the Disqualification Order and the Funding Statement. Baptiste & Wilder may continue to serve as counsel to Shaffer and the plaintiff class, and the Union may continue funding the litigation. We vacate the Notice Order and remand with instructions for the district court to approve a balanced notice statement and consent form for distribution to the 27,000 potential class members. Finally, we vacate the Dismissal Order with respect to Shaffer and the plaintiff class.

*VACATED AND REMANDED*

# UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 14, 1992

MICHELLE SHAFFER; LIONEL ALEXANDER; ANGELA ANDREWS; JOSEPH BANKS; CYNTHIA BAILEY; MARIA Y. BAILEY; KATHY BAKER; JOHN BANE; KATHERINE BARNETTE; KATHY BASTON; VICTOR BELL; DAVID L. BOGART; BARON BOOKER; CAROLYN BOTTOMS; EVEY M. BRAKE; PATRICE BRANCH; RUBEN BROWN; FRANK W. CAMPBELL; GLENN W. CAMPBELL; REGINA CARTER; QUANDA CARTER; JOHN CARVER; MURRAY EDWARD CLARK; JUSTIN COLE; FLOYD HARVEY COPELAND, III; KATHERYN COUNCIL; CHARLES R. CRAIG; M. MICHELLE DAVIS; CLARENCE J. DICKERSON; ANTHONY B. ELLERBE; HAROLD EPPERSON; ANTHONY B. FAISON; ROBERT FERRY-LEEPER; ALFRETTA KAY FLAX; CATHERINE LYNN FOSTER; CHARLENE FOX; FLOYD GAMBY; MARILYN GARDNER; JAMES GONYER, JR.; EDNA L. GORDON; THOMAS W. GRAHAM; MARVIN GREENE; DANIEL EDWARD GREER; TONY HARDIE; KATIE HARDY; RHONDA HARRIS; HAROLD F. HARTMAN, III; RICHARD E. HAUGHTON; PAULA HAYES; DARYLL HENDERSON; TAMMY C. HENRY; MARIANNE HIERSPIEL; GRANT HOLCOMB; VICKIE L. JILES; JOHN A. JOHNSON; DWIGHT JONES; MARGARET JONES; CYNTHIA R. KIRKENDOLL; CHRISTOPHER L. KIRKLAND; CHERYL KOENIG; JOHNNY KON; ROBERT LEE LINDSAY; ROBBIN R. LOVE; DARLENE L.

No. 91-2086
CA-90-1607-N

MABREY; LOIS J. MACPHEE; THOMAS MALLORY; JOSEPH W. MANNING, JR.; JENNIFER LYNN MARCOU; PHIL MARTIN, JR.; THURMAN MASSENBURG; KAREN MATTHEWS; BOBBIE SUE MELZER; JAMES J. MILLS, JR.; DELORES MOORE; TERRY NUHFER; CHRIS OLWORTH; WILLIAM T. PAGE, JR.; NEAL PARIS; PHYLLIS PEARSON; TONYA Y. PEGUESE; JAMES F. PERCY; ROSE M. POOLE; DELORES F. PRATER; SHENICE A. PRITCHETT; ROBERT PUCHALSKI; KATHY REALE; PEGGY MOORE REED; JAMES C. REED, JR.; RACHEL ROBERTSON; FRANCIS ROBINSON; ANTOINETTE ROBINSON; GALE ROGERS; JOHN CHARLES SALLDIN; CHRISTINE N. SAWYER; VIRGINIA SCHNOOR; PATRICIA G. SCHOOLCRAFT; JANATHAN A. SHERROD; JAIME P. SHOEMAKER; ANGELA M. SIFFORD; CHERYL A. SMITH; JACKIE SPARTLEY; BERTHA LOUISE STEVENSON; PATRICIA L. STEWART; JAMES H. STIERS; DORETHA L. STITH; ANGELA M. STONE; RICHARD A. STRADER; CARLA R. TORY; AMY WILDING; AMY LYNN WILLIAMS; ROSLYN WILLIAMS; SHANNON D. WILLIAMS; TAMMY C. WILLIAMS; KAY W. WILLIS; DEBORAH WILT; BARRY K. WOOD; SHARON WORMLEY; CAVANAUGH L. WRIM,

Plaintiffs-Appellants,

and

STEPHANIE R. BROOKS,

Plaintiff,

v.

FARM FRESH, INCORPORATED,

Defendant-Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

Appellee filed a petition for rehearing with suggestion for rehearing in banc and a motion for leave to file reply brief. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing and the motion for leave to file a reply brief.

The Court denies the petition for rehearing with suggestion for rehearing in banc and the motion for leave to file a reply brief.

Entered at the direction of Judge Phillips, with the concurrence of Judge Murnaghan and Judge Osteen, United States District Judge for the Middle District of North Carolina.

For the Court,

/s/ Bert M. Montague
CLERK

bcc: Honorable James Dickson Phillips Jr.
Circuit Court Judge

Honorable Francis D. Murnaghan Jr.
Circuit Court Judge

Honorable William L. Osteen Sr.
District Judge

# IN THE UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF VIRGINIA
### Norfolk Division

STEPHANIE R. BROOKS

and

MICHELE SHAFFER,

on behalf of themselves and
others similarly situated,

Plaintiffs,

v. Civil Action No. 90-1607-N

FARM FRESH, INC.,

Defendant.

## ORDER

This matter comes before the Court on the motion of the plaintiffs for approval of plaintiffs' notice to similarly situated employees.

I.

The plaintiffs, present and former employees of the defendant, Farm Fresh, Inc. (Farm Fresh), have brought this action against Farm Fresh under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. The plaintiffs claim that Farm Fresh has violated the FLSA in a variety of ways:

(1) Farm Fresh has required employees to "punch out" on the time clock, and then return to work "off the clock."

(2) Farm Fresh has required employees to carry out Farm Fresh business just prior to punching in and just after punching out.

(3) Farm Fresh has required employees to work more than forty hours in one week, but has not paid overtime wages for the overtime work.

(4) Farm Fresh has required employees to work through their lunch breaks and other breaks without compensating them for that work.

(5) Farm Fresh has altered the time records of employees, so that the employees have not received proper compensation for the hours they worked.

(6) Farm Fresh has threatened employees who have joined in this lawsuit as parties plaintiff.

Under the FLSA, employees may bring civil actions against their employers to enforce the provisions of the Act:

> An action to recover the liability prescribed [in this Act] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b). As of the date of this order, 125 plaintiffs have opted into this action by signing consent forms and causing them to be

filed with the Court.[1] Now the current plaintiffs ask the Court to approve a notice that their attorneys have drafted and propose to send out to other current and former Farm Fresh employees who are potential plaintiffs in this action. The plaintiffs describe the proposed recipients of the notice as:

> All past and present hourly employees of Farm Fresh, Inc. who, at any time after September 6, 1987, were employed in the Company's retail store operations as cashiers, meat cutters, drivers, clerks, stockpersons, baggers or similar jobs whose duties did not qualify them as managers, administrators or professionals exempt from the Fair Labor Standards Act.

*Plaintiffs' Memorandum in Support of Motion for Approval of Plaintiffs' Notice to Similarly Situated Employees*, at 4. The plaintiffs argue that the case involves questions of law and fact common to all the current plaintiffs, and common to all potential plaintiffs, because all "assert similar claims (unpaid wages) and seek similar relief (recovery of unpaid wages)." *Plaintiffs' Reply to Defendant's Brief in Opposition to Motion for Approval of Plaintiffs' Notice to Similarly Situated Employees*, at 5. The plaintiffs therefore argue that the Court should facilitate notice to the "class" of potential plaintiffs, so that these common questions of law and fact can be resolved in a single judicial proceeding.

To the plaintiffs' claims, Farm Fresh first answers that it has not violated the FLSA in any way. It alleges that the current lawsuit is the latest part of an effort on the part of Local 400 of the United Food and Commercial Workers Union (the Union) to organize food work-

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[1] The Court received 18 executed consent forms with the plaintiffs' Complaint. Later, plaintiffs' counsel filed 110 additional consent forms, but three plaintiffs had filled out two forms each, so 110 forms actually represent only 107 plaintiffs. Thus, combining the two named plaintiffs, the eighteen plaintiffs whose consents accompanied the Complaint, and the 107 plaintiffs who later joined the case by filing their consent forms, the Court concludes that 127 persons have become parties plaintiff to this action, Stephanie Brooks and Michele Shaffer by being named in the case, and 125 others by filing consent forms.

ers at Farm Fresh stores in Virginia. According to an affidavit filed by Farm Fresh's Vice President of Human Resources, Al Wanzelak, the Union first undertook this effort in 1986, resumed it in 1987, and resumed it again in April of this year.

Farm Fresh opposes the plaintiffs' motion for approval of their notice on the grounds that the notice would invite persons to become plaintiffs in this action who are not "similarly situated" to the named plaintiffs. In response to the plaintiffs' argument that their claims and the claims of all the potential plaintiffs involve common questions of law and fact, Farm Fresh argues that the plaintiffs whom it has thus far deposed have asserted a wide variety of wage and hour complaints, so that Farm Fresh potentially has a different defense as to each plaintiff. Farm Fresh argues that the current plaintiffs alone come from 38 of its 74 stores, that some worked part time, some full time, that some were fired for cause and so may be seeking vengeance rather than justice, and that these differences and others show that the plaintiffs and potential plaintiffs are not "similarly situated" as that phrase is used in the FLSA.

II.

Despite the fact that the Union is not a party to this action, the Court cannot ignore its role in this lawsuit. It is clear from the hearing on this motion, the pleadings, affidavits, supporting materials, and the consent forms themselves, that this action has been brought at the instance of the Union, and that the Union has maintained its presence to this date. The law firm that represents the plaintiffs represents the Union in other matters. 58 of the 125 consent forms that have been filed have printed at the bottom "PLEASE RETURN BY MAIL TO: U.F.C.W. Local 400." The Union's organizers distributed blank consent forms to Farm Fresh employees, copies of a newspaper story about the action, and letters from Union officers, all encouraging employees to join the lawsuit against Farm Fresh. Many of the consent forms apparently were designed to be used in lawsuits against other employers, and the other employers' names had to be crossed out and replaced with Farm Fresh's name. At the hearing on plaintiffs' motion, only two persons were present in

addition to the attorneys and court personnel; one was one of the named plaintiffs, and, according to defense counsel, the other was a former Farm Fresh employee who has filed a consent form in the case, and who is now employed by the Union as a professional organizer. All of these factors, none contested by the plaintiffs, indicate to the Court that the Union is closely involved with the prosecution of this action.

The Court notes that some of the materials distributed by Union organizers, materials that apparently produced at least a portion of the consent forms in this action, were more suited to a labor dispute than a court proceeding. One flyer read in part as follows:

> Do you have this problem - lots of overtime, with little to show for it in your paycheck?
>
> Do you sometimes work right through your lunch hour, and don't get paid for it?
>
> Has management got this crazy system where overtime is paid at a rate LESS than regular hours? Crazy to you, maybe, but not to management. They make out like bandits, at your expense!
>
> You KNOW what your problem is: You need a UNION.

Another communication, apparently signed by the President of the Union, Tom McNutt, read in part:

> You should know by now that a lawsuit has been filed on behalf of Farm Fresh employees to get back the money Farm Fresh has cheated you out of by making you work off the clock.
>
> You know they make you work off the clock. You know that it happens all the time. Farm Fresh now writes you a letter saying its their "policy" not to do it, you know the truth.
>
> . . .

Don't be fooled and don't be intimidated by Farm Fresh promises and Farm Fresh threats. Hundreds of employees have already come forward to be plaintiffs in this lawsuit and the number continues to grow.

REMEMBER — YOU HAVE TO SIGN A CONSENT FORM, IF YOU HOPE TO GET BACK THE MONEY THAT FARM FRESH OWES YOU IF YOU'VE WORKED OFF THE CLOCK.

The Union has already made a difference — and this is just the beginning.

This kind of communication, inflammatory and potentially misleading,[2] is presumably part and parcel of a large labor organization effort. It is not, however, an appropriate part of a judicial proceeding. Potential parties should consider their decisions to join this action, or any legal action, in a calm and serious manner, and with proper regard for the gravity with which the Court considers their signed statements. They should not be swayed away from the facts as they know them, by the exhortations of Union officers with interests that may include more than the simple concern that Farm Fresh adhere to the provisions of the FLSA.

The Court must exercise great care to insure that neither Farm Fresh nor the Union attempt to manipulate the Court or the law to accomplish some end in their ongoing labor dispute. The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69, protects the rights of employees to organize and to choose representatives to conduct negotiations with their employers. 29 U.S.C. § 157. The NLRA also provides the methods by which a Union can earn the right

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[2] For instance, although Mr. McNutt's letter states that "hundreds" of employees have come forward to join this action, the Court thus far knows of only 127 such employees. It may be that other employees have approached the Union or the plaintiffs' attorneys and have asked to join the case, but have been turned away for one reason or another. Nevertheless, Mr. McNutt's letter creates the impression that 200 or more employees are already parties to this case, an impression that is inaccurate.

to represent a group of employees. *Id.* § 159. Thus far, Farm Fresh employees have not chosen to organize or to select the Union as their representative. Because the current action is a representative one, and because the plaintiffs seek approval of notice to all current Farm Fresh employees and a large group of former Farm Fresh employees, and because the Union has been actively involved in the case from its outset, the current action could be seen as an attempt by the Union to make an "end-run" around federal labor law; an attempt to become the *de facto* representative of the Farm Fresh employees in this lawsuit, even though it has so far been unable to become the *de jure* representative of Farm Fresh employees through a proper election under the NLRA. The Union may already have tainted this court proceeding by circulating inflammatory literature amongst Farm Fresh employees, some of whom decided to join this suit based upon the statements and allegations in those materials.

## III.

Both parties cite the recent decision of the United States Supreme Court in *Hoffman-La Roche, Inc. v. Sperling*, 58 U.S.L.W. 4072 (U.S. Dec. 11, 1989). In *Sperling*, the Supreme Court resolved a split between the circuits, and held that district courts have discretion, in appropriate cases, to implement § 216(b) by facilitating notice to potential plaintiffs. *Id.* at 4073.[3] The Supreme Court reasoned that because the statute grants employees the right to represent other employees who are similarly situated, the statute must also grant district courts the "requisite procedural authority" to manage the process of joining the additional parties in an orderly fashion. *Id.* at 4074. The justification for this authority is that the statutory device of a representative action serves important goals, but also carries with it the potential for abuse. *Id.* Accordingly, the district court must exercise its discretion in order to ensure that the device is used in a manner calculated to achieve both judicial economy and a just resolution of the dispute for all the parties involved, whether their

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[3] *Sperling* involved a lawsuit brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, but because the ADEA incorporates § 216(b) of the FLSA, the Supreme Court was called upon to interpret the section.

involvement is actual or only potential. The Court in the instant action therefore must determine whether it will exercise its discretion to authorize the notice that the plaintiffs propose to send to potential plaintiffs. For three reasons, the Court determines that it will not.

First, the Court notes again its concern that it not be used as a bargaining chip in a labor/management dispute. The Court must ensure that neither the Union nor Farm Fresh manipulates the statutory rights of Farm Fresh employees under the FLSA in order to further goals that are properly pursued in the context of an organizational drive governed by the NLRA.

Second, the Court is concerned that some of the materials that have apparently been distributed by the Union may already have tainted this proceeding. Some of the employees who have filed consent forms with the Court may have done so because of inflammatory or misleading information contained in Union literature. Although the plaintiffs now ask the Court to authorize a notice that is more carefully worded and even-handed, the Court cannot be sure that the employees who are to receive the approved notice have not already been influenced by material they may have received from the Union.

Third, the Court is not yet able to determine whether all of the current plaintiffs in this action are "similarly situated" for purposes of § 216(b) of the FLSA. The plaintiffs argue that they are, and the defendant argues that they are not. Further discovery would aid the parties in arguing and the Court in resolving the issue of whether the named plaintiffs are entitled to represent the plaintiffs who have filed consent forms. The issue of whether the named plaintiffs are entitled to represent the plaintiffs who have already filed consent forms should be resolved before the Court allows the plaintiffs to notify more employees that they may join this action.[4] Approval of the plaintiffs' notice at this time could give the recipients of the notice the impression that they have a right to join in this

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[4] The parties have tentatively agreed that there are 27,000 members in the group the plaintiffs wish to notify. Postage alone for such a large group would amount to $6750.00. The Union would presumably bear this cost. The Court's approval of notice to additional employees at this time could therefore further involve the Union in the action.

lawsuit. Such an impression would be inaccurate, because the "similarly situated" issue has not yet been resolved.

For these three reasons, and within the discretion granted by *Sperling*, the plaintiffs' Motion for Approval of Plaintiffs' Notice to Similarly Situated Employees is DENIED. The Court ORDERS that neither the parties nor the Union, nor anyone acting for them, in their interest, or at their behest, conduct any further activity to attempt to recruit additional plaintiffs in this action until further order of Court. Of course, if any employee decides on his or her own initiative to file a consent form with the Court, such an employee may do so.

The Court has before it enough plaintiffs to allow the parties to conduct sufficient discovery to resolve the three concerns discussed above. After the Court has had the opportunity to consider these concerns more fully with the benefit of further discovery, it may re-address the issue of notice. The parties should therefore seek a prompt hearing on any discovery matters they wish to have resolved by the Court, so that the Court can set the proper scope of discovery.

The Clerk is DIRECTED to send a copy of this Order to counsel for the plaintiffs and to counsel for the defendant.

IT IS SO ORDERED.

J. Calvitt Clarke, Jr.

Norfolk, Virginia
December 28, 1990

# IN THE UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF VIRGINIA
**Norfolk Division**

STEPHANIE R. BROOKS

and

MICHELE SHAFFER,

on behalf of themselves and
others similarly situated,

Plaintiffs,

v. Civil Action No. 90-1607-N

FARM FRESH, INC.,

Defendant.

**ORDER**

This matter comes before the Court on the motion of the defendant, Farm Fresh, Inc. (Farm Fresh), to disqualify the law firm that represents the plaintiffs. The plaintiffs, present and former employees of Farm Fresh, have brought this action against Farm Fresh under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. The plaintiffs claim that Farm Fresh has violated the FLSA by requiring them to work off-the-clock hours, and to work overtime hours at regular, rather than overtime, pay rates.

The defendant has moved to disqualify plaintiffs' counsel, the law firm of Baptiste & Wilder, P.C. Farm Fresh argues that because of the ties between Baptiste & Wilder and Local 400 of the United

Food and Commercial Workers Union (the Union), and because of the interest and involvement of the Union in the progress and outcome of the lawsuit, the plaintiffs' attorneys cannot adequately represent the interests of their clients. The parties have asked the Court to decide the defendant's motion based on their pleadings.

## I.

Under the FLSA, employees may bring civil actions against their employers to enforce the provisions of the Act:

> An action to recover the liability prescribed [in this Act] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b). As of the date of this order, 125 plaintiffs have opted into this action by signing consent forms which have been filed with the Court.[1] Earlier in the case, the plaintiffs asked the Court to approve a notice that their attorneys had drafted and were proposing to send out to other current and former Farm Fresh employees. The plaintiffs described the proposed recipients of the notice as:

> All past and present hourly employees of Farm Fresh, Inc. who, at any time after September 6, 1987, were employed in the Company's retail store operations as cashiers, meat cutters,

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[1] The Court received 18 executed consent forms with the plaintiffs' Complaint. Later, plaintiffs' counsel filed 110 additional consent forms, but three plaintiffs had filled out two forms each, so 110 forms actually represent only 107 plaintiffs. Thus, combining the two named plaintiffs, the eighteen plaintiffs whose consents accompanied the Complaint, and the 107 plaintiffs who later joined the case by filing their consent forms, the Court concludes that 127 persons have become parties plaintiff to this action, Stephanie Brooks and Michele Shaffer by being named in the case, and 125 others by filing consent forms.

drivers, clerks, stockpersons, baggers or similar jobs whose duties did not qualify them as managers, administrators or professionals exempt from the Fair Labor Standards Act.

Plaintiffs' Memorandum in Support of Motion for Approval of Plaintiffs' Notice to Similarly Situated Employees, at 4. The parties have tentatively agreed that the above-described group numbers approximately 27,000 people. The plaintiffs argued that the case involved questions of law and fact common to all the current plaintiffs, and common to all potential plaintiffs, because all "assert similar claims (unpaid wages) and seek similar relief (recovery of unpaid wages)." Plaintiffs' Reply to Defendant's Brief in Opposition to Motion for Approval of Plaintiffs' Notice to Similarly Situated Employees, at 5. The plaintiffs therefore argued that the Court should facilitate notice to the "class" of potential plaintiffs, so that these common questions of law and fact could be resolved in a single judicial proceeding. In reply, Farm Fresh argued that the plaintiffs and potential plaintiffs were not "similarly situated" for purposes of the FLSA because the plaintiffs claimed a wide variety of wage violations, and because Farm Fresh had a wide variety of defenses to the claims.

The Court declined to approve plaintiffs' notice to potential plaintiffs. The Court found that the parties had not developed enough factual material for the Court to determine whether the plaintiffs were "similarly situated" under the FLSA. The Court was also concerned that it was being used as a bargaining chip in an organizing campaign, and that the Union may have misled some of the opt-in plaintiffs into signing their consent forms. The Court determined that the parties should proceed with discovery in general, and with the depositions of named and opt-in plaintiffs in particular, in order to help the Court determine whether the named plaintiffs, opt-in plaintiffs, and potential plaintiffs were "similarly situated" under the FLSA. The Court instructed the parties to return to the Court when either had discovery material to support their respective contentions that the plaintiffs were or were not "similarly situated."

Since the hearing on the plaintiffs' Motion for Approval of Notice, the parties have returned to the Court twice because they have

not been able to agree on the proper scope of discovery. Farm Fresh argued that under the discovery rules, it had the right to depose each of the 127 parties plaintiff. The plaintiffs argued that because they intended to prove their case at trial through representative testimony, Farm Fresh was not entitled to depose each opt-in plaintiff. The Court held that Farm Fresh was entitled to depose the opt-in plaintiffs, at least until either party felt that the record was sufficiently developed for the Court to determine whether the case should proceed as a representative action. This determination would again depend upon the plaintiffs ability to show that they were "similarly situated" under the FLSA, or the defendant's ability to show that they were not. The defendant has now moved the Court to disqualify the plaintiffs' attorneys.

II.

The current lawsuit is the latest part of a Union effort to organize food workers at Farm Fresh stores in Virginia. According to an affidavit filed by Farm Fresh's Vice President of Human Resources, Al Wanzelak, the Union first undertook this effort in 1986, resumed it in 1987, and resumed it again in April of 1990. The plaintiffs have not contested these facts. It is clear from the hearings the Court has held, from the pleadings, affidavits, supporting materials and the consent forms themselves, that this action has been brought at the instance of the Union, and that the Union has maintained its presence to this day. Some of the materials distributed by Union organizers, materials that apparently produced at least a portion of the consent forms in this action, make the Union's interests clear. One flyer read in part as follows:

> Do you have this problem - lots of overtime, with little to show for it in your paycheck?
>
> Do you sometimes work right through your lunch hour, and don't get paid for it?
>
> Has management got this crazy system where overtime is paid at a rate LESS than regular hours? Crazy to you, maybe, but not to

management. They make out like bandits, at your expense!

You KNOW what your problem is: You need a UNION.

What difference does a union make?

If you have to work overtime, you get paid for every minute worked. And the rate for overtime goes UP, not DOWN!

That isn't a promise. It's a written guarantee. In a union contract.

Another handout, signed by the President of the Union, Tom McNutt, read in part:

You should know by now that a lawsuit has been filed on behalf of Farm Fresh employees to get back the money Farm Fresh has cheated you out of by making you work off the clock.

You know they make you work off the clock. You know that it happens all the time. Farm Fresh now writes you a letter saying its their "policy" not to do it, you know the truth.

Why does Farm Fresh write you a letter now about working off-the-clock? BECAUSE THEY KNOW ITS TRUE AND THEY'RE AFRAID OF THE AMOUNT OF MONEY THEY WILL HAVE TO PAY YOU.

Don't be fooled and don't be intimidated by Farm Fresh promises and Farm Fresh threats. Hundreds of employees have already come forward to be plaintiffs in this lawsuit and the number continues to grow.

REMEMBER — YOU HAVE TO SIGN A CONSENT FORM, IF YOU HOPE TO GET BACK THE MONEY THAT FARM FRESH OWES YOU IF YOU'VE WORKED OFF THE CLOCK.

The Union has already made a difference — and this is just the beginning.

These materials,[2] and other materials distributed by the Union, show that the Union is taking credit for this lawsuit, and attempting to use the lawsuit as an organizational tool. If the plaintiffs had brought this lawsuit on their own initiative, and had hired attorneys who were not associated with the Union, the Union's interests in the lawsuit might be irrelevant. The Union's interests in the lawsuit have become relevant, however, largely because the attorneys for the plaintiffs are associated with the Union.

III.

Baptiste & Wilder represents the plaintiffs in this case. Baptiste & Wilder also represents the Union, in other matters. Transcript of Proceedings, at 17-18 (December 19, 1990); Transcript of Proceedings, at 6 (January 10, 1991). The defendant claims that Baptiste & Wilder is the Union's "chief outside counsel," and the law firm does not dispute this characterization. Defendant's Reply Brief in Support of its Motion to Disqualify Plaintiffs' Counsel, at 2. As part of its latest organizational campaign, begun in April, 1990, the Union asked Baptiste & Wilder to prepare questionnaires and consent forms to be distributed by Union organizers to Farm Fresh employees. Deposition of Union official James L. Hepner, at 48-49, 55

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[2] In an earlier order, the Court described these materials as "inflammatory and potentially misleading," and stated that they were more suited to a labor dispute than a court proceeding. The Court would not normally review campaign literature for accuracy or propriety in an FLSA lawsuit, but the conduct of the Union and the attorneys in this case have made these materials part of the case. The materials tell employees that they have been cheated, and that "hundreds" of their fellow employees have joined the lawsuit against Farm Fresh. In fact, only 127 employees have joined the lawsuit. The materials also give the impression that a Union contract is necessary to force management to pay employees at a proper rate. In fact, as the Union and its attorneys know, Farm Fresh is required by law to pay its employees at the proper rate, whether a "written guarantee . . . [i]n a union contract" exists or not.

(Nov. 19, 1990). Union organizers distributed the consent forms at the same time that they distributed the handouts the Court has already reviewed. Many of the consent forms specified that they were to be returned to the Union. The Union gave the forms to the attorneys at Baptiste & Wilder, who then instituted this lawsuit. Since then, the Union has been paying the costs of the lawsuit, Transcript of Proceedings, at 14-15 (January 10, 1991), and the plaintiffs' attorneys apparently have not discussed fee arrangements with any of their clients.[3]

The issue before the Court is therefore clear: May a Union that is conducting a so far unsuccessful organizational campaign targeting a specific employee population ask its attorneys to design and prosecute a lawsuit on behalf of some of those employees against their employer under the Fair Labor Standards Act, fund the costs of the lawsuit, and attempt to use the existence of the lawsuit to garner support for its organizational effort, all without impairing the ability of the attorneys to represent the interests of the employees rather than the interests of the Union?

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[3] Although the Court has not been furnished with complete copies of all of the depositions in this case, the defendant has cited the depositions of named plaintiff Michele Shaffer, and opt-in plaintiffs Gail Rogers, Margaret Jones, and Terri Nuhfer, as evidence that none of the plaintiffs have discussed fee arrangements with their attorneys. The defendants have not yet been successful in their attempts to depose the other named plaintiff, Stephanie Brooks. Brief in Support of Defendant's Motion for Sanctions, at 4, 6-7. Baptiste & Wilder has not contested the defendant's assertion, however, and the Court therefore considers the defendant's claims to be accurate. One of Baptiste & Wilder's attorneys emphasized to the Court that the Union was paying the costs of the litigation, but not his fee. He did not, however, discuss who was paying his fee, or whether Baptiste & Wilder considered the case to be a *pro bono* project.

The Court does not normally inquire into the fee arrangements of attorneys practicing before it. In this case, however, the fact that Baptiste & Wilder appears to be unconcerned about its fee is yet another indication that the Union's desires could have an inordinate effect on the firm's professional judgment. A law firm is a business, after all, and the voice of a paying customer speaks louder to a business than the voice of a nonpaying customer.

## IV.

A district court has broad discretion in determining whether disqualification of counsel is required in a particular case. *Whiting Corp. v. White Mach. Co.*, 567 F.2d 713, 715 (7th Cir. 1977); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976). A court may require an attorney to withdraw from a case where even the appearance of impropriety exists. *Schloetter*, 546 F.2d at 709; *Gas-A-Tron of Ariz. v. Union Oil Co. of Cal.*, 534 F.2d 1322, 1324-25 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1385-86 (3rd Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 732 (E.D. Va. 1990). The Court has repeatedly held that it must balance a party's right to counsel of choice with its responsibility to insure the integrity of the proceedings before it and public confidence in the integrity of the bench and bar. *Tessier*, 731 F. Supp. at 729; *In re Asbestos Cases*, 514 F. Supp. 914, 925 (E.D. Va. 1981) (*citing Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975) (overruled on other grounds by *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), *vacated & remanded*, 449 U.S. 1106 (1981)); *Hull v. Celanese Corp.*, 513 F.2d 568, 569 (2d Cir. 1975)).

The Virginia Code of Professional Responsibility governs the conduct of attorneys practicing before this Court. Local Rule 7(I). Canon 5 of the Code states, "A lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." One of the disciplinary rules derived from this Canon, and relevant to the instant motion, is DR 5-105, which reads in part:

> DR 5-105. *Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.* - (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

. . .

Rules of the Supreme Court of Virginia, Part 6, § II, Canon 5, DR 5-105 (Michie 1990); *see infra*, fn. 5.

After a thorough review of the record and the arguments of counsel, the Court finds that the exercise by the attorneys at Baptiste & Wilder of their independent professional judgment on behalf of the plaintiffs is likely to be adversely affected by the firm's representation of the Union. The fact that the Union is another of Baptiste & Wilder's clients alone would raise the possibility of an adverse effect on the independent professional judgment of the firm's attorneys. Here, however, the Union's direct involvement in the case has made the possibility into a likelihood, if not an actuality. The Union is not just another client for the firm; the Union is the party that brought the case to the firm's doorstep, the party who is paying the costs of the lawsuit, a party that stands to gain if the lawsuit is successful, the party that takes credit for the lawsuit, and the party that even a named plaintiff apparently considers responsible for the lawsuit. *See* Deposition of Michele A. Shaffer, at 74 (November 28 & 29, 1990) (plaintiff stated her impression that Baptiste & Wilder attorney was "handling the FLSA suit for the union"). These factors make it likely that the attorneys will be subject to any conflicts that exist between the Union's interests and the plaintiffs'.

Baptiste & Wilder argues that no conflict of interest exists between the firm's representation of the plaintiffs and the firm's representation of the Union. The firm argues that "vindication of the plaintiffs' claims by trial or settlement will coincide exactly with the Union's interests." Plaintiffs' Brief in Opposition to Defendant's Motion to Disqualify Counsel, at 12. The firm further argues that Farm Fresh's motion is a delaying tactic, and that Farm Fresh's

assertions regarding potential conflicts of interest between the Union and the plaintiffs are "both speculative and specious." *Id.* at 2, 10.

The Court disagrees with these arguments.[4] The plaintiffs have a single interest in this lawsuit. They want to recover money that they claim Farm Fresh owes them for hours the company required them to work without pay or without proper pay. The Union may have this interest in common with the plaintiffs, but the Union has other interests as well. The Union is trying to become the elected bargaining representative of the Farm Fresh employees. Despite organizational efforts going back four years, the Union has not been successful in achieving this goal; the employees have not asked the Union to represent them. The evidence therefore indicates that the Union and the employees do not have identical interests.

In the face of these differing interests, the Court must disagree with Baptiste & Wilder's contention that vindication of the employees' interests is vindication of the Union's interests. The Court cannot ignore the Union's attempts to use the lawsuit to encourage employees to elect the Union. For this purpose, the mere existence of the lawsuit serves the Union's interests. Of course, the plaintiffs' winning the lawsuit would also serve the Union's interests. If the plaintiffs were to win quickly and quietly, however, through a confidential settlement, for instance, the Union would be unable to take full advantage of the lawsuit in its organizational efforts. To the extent that the Union is using the lawsuit's existence to promote its organizational goals, the lawsuit's disappearance would not be in the Union's interests.

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[4] Regarding the motives of the defendant in bringing this disqualification motion, the Court points out that every member of the bar who is aware of facts justifying disqualification is obligated to bring those facts to the Court's attention. *See United States v. Clarkson*, 567 F.2d 270, 271-72 n. 1 (4th Cir. 1977). The Court is then charged with determining the merits of the motion, and the motives of the movant are not relevant to this determination.

Because Farm Fresh has not yet made any settlement overtures to any of the plaintiffs, Baptiste & Wilder dismisses as speculative any argument that a conflict could arise if Farm Fresh were to offer to settle the case confidentially. The issue, however, is not necessarily whether the conflict has already adversely affected the judgment of the plaintiffs' attorneys, but whether their judgment "will be or is likely to be" adversely affected by the conflict. Va. Code Prof. Resp. DR 5-105(A), (B). Baptiste & Wilder also dismisses the argument because its attorneys "doubt that this court would permit a representative plaintiff, who is charged with the duty to represent opt-in class members, to settle his or her claim confidentially." Plaintiffs' Brief in Opposition to Defendant's Motion to Disqualify Counsel, at 10 (citing Fed. R. Civ. P. 23(e)). Whether the Court would or would not approve such an agreement, however, is not relevant. The issue is whether the Union's involvement in the lawsuit, and the Union's financial relationship with the lawsuit and with Baptiste & Wilder, make it likely that Baptiste & Wilder's independent professional judgment on behalf of the plaintiffs will be adversely affected by its representation of the Union. If the firm's judgment is likely to be adversely affected, the adverse effect could prevent the parties from reaching a settlement agreement, whether the Court would approve the agreement or not.

Baptiste & Wilder argues that "[a]t present, it is useless to speculate how a hypothetical offer might be received" by the plaintiffs. *Id.* Again, the Court disagrees. Speculation as to how the plaintiffs and their attorneys might receive such a settlement offer is exactly what the Code of Professional Responsibility requires of an attorney. When an attorney represents two parties that are interested in one case, the attorney must "speculate" about how the dual representation could affect his or her judgment. The failure of the attorneys at Baptiste & Wilder even to consider that the interests of the Union might diverge from the interests of the plaintiffs is yet another

indication to the Court that their independent judgment is likely to be affected by the Union's interests in this lawsuit.[5]

Because the Union is conducting its organizational campaign at the same time that it is financing this litigation, it may wish to shorten or lengthen the case to coincide with the timing of its organizational drive. It has the ability to influence the course of the case by granting or withholding its financial support. Baptiste & Wilder insists that there is no evidence that the Union would use its financial support of the case to influence the firm's decisions, and that the Union "understands and respects the firm's insistence on the right to exercise its judgment in cases that proceed to litigation." Plaintiffs' Brief in Opposition to Defendant's Motion to Disqualify Counsel, at 10-11. The attorneys also argue that the Union would support the case independent of the organizational campaign.[6] *Id.* at 11.

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[5] For instance, Va. Code Prof. Resp. DR 5-105(C) provides:

> In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

The Court has not addressed the effect of this provision of the Code on the case, because the plaintiffs' attorneys did not address the issue of disclosure in their briefs. The Court assumes from the attorneys' silence on this issue that they have not discussed the potential for conflict with any of their clients. Obviously, a party cannot consent after disclosure when there has been no disclosure.

[6] As support for the contention that the case will continue regardless of the organizational campaign, the attorneys cite statements made by a Union official at his deposition:

> I know that whether we stop organizing tomorrow the FLSA will go on. If Farm Fresh decides to settle with people and feel like they've been wrong tomorrow, right now my plans are to still organize. So one doesn't hinge on the other. They are two separate things but it was derived out of the organizing campaign.

Deposition of Union official James L. Hepner, at 16-17 (November 19, 1990). These statements do not support the attorneys' contention. Hepner stated that the FLSA will continue if the campaign ends, and that the campaign will continue if the lawsuit ends, but he did not say that the Union will continue to support the case if the campaign ends.

The assertions of the attorneys at Baptiste & wilder about the present intentions of the Union are not enough to dispel the likelihood that the Union's financial ties to this case will influence their independent professional judgment. A union's income consists largely of dues paid by its members. In financing the costs of this case, the Union is therefore using the dues of its current members to pay the costs of litigation for potential members. If the organizational campaign fails, the plaintiffs will no longer be potential members. It would be unreasonable to assume that the current members of the Union would support the continued use of their dues to benefit employees who have decided not to join the Union, and will therefore never pay dues themselves. If the campaign were to fail, the Union would no longer have any reason to support the case, and would have good reason to withdraw its support. These are exactly the kind of "practical considerations" that the court must take into account when determining whether a conflict of interest exists. *Aetna Gas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978).

The Court finds that the Union has interests in this lawsuit that differ from the interests of the plaintiffs. The Court further finds that these differences create an actual conflict of interest that is likely to adversely affect the independent professional judgment of the attorneys at Baptiste & Wilder. On the basis of these findings, the Court holds that the attorneys at Baptiste & Wilder must be disqualified pursuant to DR 5-105 of the Virginia Code of Professional Responsibility.

## V.

In reaching the above conclusion, the Court has considered the Union as it would consider any other client of Baptiste & Wilder. In other words, the Court has held that the interests of one of Baptiste & Wilder's clients are likely to have an adverse impact upon the interests of the firm's clients in this case. Baptiste & Wilder argues that the Union is not just another client, but is a labor union, and that its relationship with the attorneys and the plaintiffs in this case is therefore protected by the first amendment. The law firm bases this contention on a string of Supreme Court cases.

In the cases cited by the plaintiffs, the Supreme Court overturned injunctions against labor unions that prohibited the unions from participating in various ways in litigation brought on behalf of their members. *United Transportation Union v. Michigan Bar*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964). In *United Transportation Union*, the union recommended certain lawyers to its members, set a cap on the fee those lawyers would receive, and paid the expenses of transporting union members to the lawyers' offices. *United Transportation Union*, 401 U.S. at 578. In *Mine Workers*, the union employed a lawyer on a salary basis to represent any of the union's members who wanted the lawyer to prosecute workmen's compensation claims. *Mine Workers*, 389 U.S. at 218. In *Railroad Trainmen*, the union's Legal Aid Department selected lawyers or law firms in each of sixteen regions of the United States, and recommended these lawyers to members who sought legal assistance in bringing personal injury claims. *Railroad Trainmen*, 377 U.S. at 2. In each of the cases, the Supreme Court held that the first amendment protected the activities of the union. *United Transportation Union*, 401 U.S. at 576; *Mine Workers*, 389 U.S. at 222; *Railroad Trainmen*, 277 U.S. at 5. The plaintiffs argue that they have a similar first amendment right to be represented by Baptiste & Wilder. They quote the following passage in support of their argument:

> In the context of this case we deal with a cooperative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action. . . . The common thread running through our decisions in *NAACP v. Button*, [371 U.S. 415 (1963),] *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.

*United Transportation Union*, 401 U.S. at 585-86.

The Court is not persuaded by the plaintiffs' first amendment arguments. In each of the cases they cite, the union sought to aid its members. In each, the Supreme Court found that the first amendment protected the right of a union of workers to join together in order to help each other conduct legal activities. The Court of course accepts the Supreme Court's holdings. In the instant case, however, and with respect to the plaintiffs, the Union is a union in name only; it does not represent Farm Fresh employees in general, nor the plaintiffs in particular. Therefore, its involvement in the case does not entail a group of employees joining together to vindicate their legal rights; it entails a third party assisting a group of employees to vindicate their legal rights. In short, the Union's participation in the case is not collective activity, and therefore is not entitled to the same scope of protection that the Supreme Court has given to unions acting on behalf of employees who have chosen them as representatives.

The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69, protects the rights of employees to organize and to choose representatives to conduct negotiations with their employers. 29 U.S.C. § 157. The NLRA also provides the methods by which a Union can earn the right to represent a group of employees. *Id.* § 159. Thus far, Farm Fresh employees have not chosen to organize or to select the Union as their representative. The Union's involvement in the litigation creates the impression that the Union has the right to represent Farm Fresh employees, when in fact it has no such right under the NLRA. The Union is aware of and has promoted this impression by pointing to the lawsuit as evidence that "The Union has already made a difference — and this is just the beginning."[7] The appearance that the Union has the right to represent Farm Fresh employees is exacerbated by the representative nature of the case, and could grow stronger if the Court allowed Baptiste & Wilder to remain in the case. In other words, to the extent the plaintiffs succeed in proving their

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[7] The Union made this statement in a handout created by Union organizers and signed by the president of the Union, Tom McNutt. Deposition of Union official James L. Hepner, at 21. (Nov. 19, 1990). Union organizers distributed the handout to Farm Fresh employees, and may also have mailed the handout to them. *Id.* at 22.

claims that they are similarly situated with respect to a company-wide Farm Fresh policy to underpay its employees, they gain the right to represent a larger portion of Farm Fresh employees. This in turn increases the appearance that the Union has a right to represent the employees without adhering to the requirements of the NLRA.

The impression that the Union can ignore the requirements of the NLRA by using these judicial proceedings to represent Farm Fresh employees, despite never having been chosen by the employees as their representative, is a direct result of their participation in this case through their attorneys at Baptiste & Wilder. Allowing this impression to go unchecked would undermine federal labor law, as well as the integrity of the Court. As the Court has noted, the appearance of impropriety can justify disqualification in appropriate circumstances. *See supra*, part IV. Through its attorneys, the Union has attempted to become the *de facto* representative of the Farm Fresh employees in this lawsuit, without becoming the *de jure* representative of Farm Fresh employees through a proper election under the NLRA. This creates not only the impression that the Union can ignore the NLRA; it also creates the impression that the Union can use the Court as a tool in its organizational effort. Baptiste & Wilder's participation in and conduct of the case have contributed to these impressions, and create an appearance of impropriety that justifies disqualification.[8]

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[8] At the Union's request, Baptiste & Wilder designed the questionnaires and the consent forms distributed to Farm Fresh employees by Union organizers. As the Court has noted, the attorneys at Baptiste & Wilder allowed the organizers to distribute these forms in combination with potentially misleading Union handouts. The opt-in forms were drafted in such a way that the employees who signed them affirmed nothing by their signatures except that they would like to receive any money that might come out of the lawsuit. The full text of the forms read:

> The employee below consents to become a party plaintiff to a civil action brought or to be brought against Farm Fresh to recover wages which are or may be owed to this employee by Farm Fresh pursuant to the provisions of the Fair Labor Standards Act.

After the employees returned their signed forms to the Union, the Union turned them over to Baptiste & Wilder. When the Baptiste & Wilder filed them with the Court, it apparently did not review the identities or claims of the opt-in

**continued**

The fact that the Union has not been elected by the employees, a fact that the plaintiffs' attorneys completely ignore in their brief on this motion, puts the Union's participation in this lawsuit through its attorneys beyond the scope of the first amendment protections described by the Supreme Court in *United Transportation Union, Mine Workers,* and *Railroad Trainmen.* It also creates an appearance of impropriety that supports the defendant's motion for disqualification.[9]

## CONCLUSION

Through its attorneys, the Union has created and promoted this lawsuit in an attempt to acquire in the courtroom what it has so far been unable to acquire in the workplace; namely, the right to represent Farm Fresh employees throughout Virginia. In so doing, it has created a conflict of interest for the attorneys at Baptiste & Wilder that is likely to affect adversely the attorneys' use of independent professional judgment on behalf of their clients in this case, the plaintiffs. The likelihood of this adverse effect merits disqualification of the law firm of Baptiste & Wilder. Through its attorneys, the

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plaintiffs closely enough to realize that three of the employees had filed two forms each with the Union. The law firm filed six forms with the Court that represented only three opt-in plaintiffs. Although the Court's disqualification of Baptiste & Milder is based on the conflict of interest and the appearance of impropriety, the Court notes that Baptiste & Milder's attorneys have not demonstrated that they took care to ensure that they filed consent forms only for employees who had valid claims. This indicates to the Court that their independent professional judgment may already have been adversely affected by their relationship with the Union.

[9] Because the plaintiffs' attorneys did not address the impact of the Union's non-elected status with respect to the plaintiffs and other Farm Fresh employees, but simply cited cases involving elected unions assisting their members, the Court has not had the benefit of their viewpoint on this matter. The attorneys apparently believe that the Union's lack of representative standing is not relevant to the disqualification motion. If so, the Court disagrees, for the reasons stated in its opinion. In the NLRA, Congress has attached a great deal of significance to whether a union is the chosen representative of a group of employees. *See* 29 U.S.C. §§ 157, 159.

Union has also created an appearance of impropriety, an appearance that the Union can use its money and attorneys to short-cut the election procedures of the National Labor Relations Act, and can use the Court as a campaign device in its organizational drive. This appearance of impropriety also merits the disqualification of Baptiste & Wilder.

For the reasons expressed in this opinion, the motion to disqualify the law firm of Baptiste & Wilder is GRANTED.

The plaintiffs shall promptly seek new counsel to represent them in this action. The plaintiffs are cautioned to avoid selecting counsel who will be subject to the conflicts of interest that have merited the disqualification of Baptiste & Wilder. The plaintiffs shall report to the Court within two weeks of the date of this Order on their efforts to secure new counsel.

The clerk is DIRECTED to send a copy of this Order to local counsel for the plaintiffs, to the law firm of Baptiste & Wilder, to the named plaintiffs Michele Shaffer and Stephanie Brooks, and to counsel for the defendant.

IT IS SO ORDERED.

J. Calvitt Clarke, Jr.

Norfolk, Virginia
February 21, 1991

# IN THE UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF VIRGINIA
**Norfolk Division**

STEPHANIE R. BROOKS

and

MICHELE SHAFFER,

on behalf of themselves and
others similarly situated,

Plaintiffs,

v. Civil Action No. 90-1607-N

FARM FRESH, INC.,

Defendant.

**ORDER**

This matter comes before the Court on plaintiffs' Motion for Reconsideration of Order Disqualifying Plaintiffs' Counsel, or in the Alternative, for Certification for Interlocutory Appeal under 28 U.S.C. § 1292(b). The Court has reviewed the plaintiffs' motion and the defendant's memorandum in opposition. Neither party has requested an oral hearing, and the Court feels that the issues are sufficiently presented in the briefs. For the reasons stated below, the Court denies plaintiffs' motion for reconsideration, and denies plaintiffs' motion for certification under 28 U.S.C. § 1292(b).

The Court has reviewed the facts of the case in detail in prior orders. *Order* (Dec. 28, 1990); *Order* (Feb. 21, 1991). On February

21, 1991, the Court disqualified the law firm of Baptiste & Wilder from representing the plaintiffs in the case, because the Court found that the independent professional Judgment of the lawyers at the firm was, or was likely to be, adversely affected by their representation of another client. *See* Rules of the Supreme Court of Virginia, Part 6, § II, Canon 5, DR 5-105(B) (Michie 1990) [hereinafter cited as Va. Code Prof. Resp.]. Baptiste & Wilder now asks the Court to reconsider its ruling. Baptiste & Wilder argues that the Court erred in disqualifying it for two reasons. The firm argued both of these reasons in the brief it submitted on the defendant's motion for disqualification, and the Court thoroughly considered them in its Order disqualifying the firm. The Court therefore denies the firm's motion for reconsideration for the reasons that it granted the defendant's motion to disqualify the firm. *Order* (Feb. 21, 1991). The Court will summarize the arguments below.

## I. A HEIGHTENED STANDARD OF REVIEW WAS NOT REQUIRED

The firm first argues that because the Union's involvement in the case implicated the associational freedoms guaranteed to the plaintiffs and the Union by the first amendment, the Court should have used a higher standard of review in determining whether the firm was in danger of violating the Code of Professional Responsibility. As the Court has held, the activities of the Union and the law firm of Baptiste & Wilder are not entitled to the first amendment protection they seek. *Order*, at 17-22 (Feb. 21, 1991). The Supreme Court has protected the rights of unions and their **members** to engage in group legal activity. *See United Transportation Union v. Michigan Bar*, 401 U.S. 576(1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217(1967); *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964). The Supreme Court has not extended this right to protect the activities of a union such as the one involved in this case, which is "soliciting, financing and assisting litigation," *Memorandum of Law in Support of Plaintiffs' Motion for Reconsideration*, at 24, on behalf of **nonmembers**, while simultaneously engaging in an organizational campaign targeting the non-members and their fellow employees.

The other cases cited by the firm, *NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978), likewise do not support its position. First, the cases are not factually on point. The two cases involved non-profit organizations whose basic purpose was to aid otherwise powerless litigants in asserting basic civil rights. In *Button*, the Supreme Court held that the state of Virginia could not prohibit the activities of NAACP members and lawyers in seeking to help litigants bring lawsuits to achieve desegregation in the public schools. *Button*, 371 U.S. at 420, 439-43. In *Primus*, the Supreme Court held that the first amendment protected the efforts of an ACLU-affiliated attorney to bring a lawsuit on behalf of a woman who had been sterilized as a condition of continued receipt of medical assistance through Medicaid. *Primus*, 436 U.S. at 415, 439. In both cases, the Supreme Court fashioned a broad rule to protect the activities of organizations seeking to aid the assertion of civil rights. In doing so, it clearly accorded great weight to the politically expressive character of the activities engaged in by the NAACP and the ACLU. *Primus*, 436 U.S. at 428, 437-38; *NAACP*, 371 U.S. at 429, 431. By contrast, the Union in this case is not involved in the kind of political expression that is at the core of the first amendment. Its ostensible goal is to help the plaintiffs assert their statutory wage rights under the Fair Labor Standards Act. Such a goal does not entitle the Union and its lawyers to the broad protections the first amendment accords to the pursuit of basic civil rights.

For the reasons stated above and in the Court's prior Order, the Union's involvement in this case does not require the Court to apply a higher than normal standard of proof in its determination of the disqualification motion. Under the circumstances of the case, in which the Union is not involved in political expression, and is seeking to assert the legal rights of employees who are not members of the Union, the first amendment does not protect the lawyers from the normal operation of the Code of Professional Responsibility.

## II. DISQUALIFICATION WAS NECESSARY

Baptiste & Wilder next argues that the Court disqualified the firm on the basis of speculation, hypothesis, and conJecture. The

Court disagrees. On the basis of the facts before it, and the practical considerations resulting therefrom, the Court found that the Union's stake in the prosecution and outcome of the litigation differed from the plaintiffs' stake in its prosecution and outcome. The Court found that these differing interests created an actual conflict of interest between the firm's representation of the Union in other matters and the firm's representation of the plaintiffs in this matter. Because the Union was funding the costs of the lawsuit, and had been intimately involved in the solicitation and prosecution of the lawsuit, it had already influenced the course of the litigation, and stood in a position to further distort the litigation to its benefit if it were allowed to remain.

The firm argues that the Court "adopted a standard for disqualification ... that has been applied nowhere else." *Memorandum of Law in Support of Plaintiffs' Motion for Reconsideration*, at 10. The firm quotes the Court's statement that "[w]hen an attorney represents two parties that are interested in one case, the attorney must 'speculate' about how the dual representation could affect his or her Judgment." Id. (quoting *Order*, at 14 (February 21, 1991)). The firm seriously misreads the Court's Order when it states that this passage contains the standard under which the Court determined whether disqualification was merited. The Court used the standard contained in the Code of Professional Responsibility: "A lawyer shall not continue multiple employment if the exercise of his independent professional Judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client." Va. Code Prof. Resp. DR 5-105. The statement of the Court quoted by Baptiste & Wilder was made in response to the firm's argument that it was "useless" to speculate about how the firm might receive a settlement offer from the defendant. *Plaintiffs' Brief in Opposition to Defendant's Motion to Disqualify Counsel*, at 10. The Court merely intended to emphasize for counsel that the Code of Professional Responsibility requires attorneys to ask themselves whether dual representation of clients with conflicting interests will affect their professional Judgment.

The Court fully recognizes that disqualification of attorneys is not a step to be taken lightly, and that it should be based on practical considerations grounded in fact, rather than far-fetched conjecture. *See Order*, at 16 (February 21, 1991); *see also Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978). Nevertheless, based upon the practical realities presented by the posture of this case and the Union's involvement in it, the Court found that the attorneys at Baptiste & Wilder, if they had theretofore been able to represent the plaintiffs without regard to the Union's interest in the case, were not likely to be able to continue to do so. The Court has already reviewed its reasons for this finding. *Order*, at 7-17 (February 21, 1991).

## III. CERTIFICATION FOR APPEAL UNDER 28 U.S.C. § 1292[B)

Baptiste & Wilder has moved in the alternative for the Court to certify its disqualification of the firm for interlocutory appeal under 28 U.S.C. § 1292(b). Section 1292(b) reads in parts:

> When a district Judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). The firm argues that the Court should certify the following issue, which it quotes from the Court's disqualification Order:

> May a Union that is conducting a so far unsuccessful organizational campaign targeting a specific employee population ask its attorneys to design and prosecute a lawsuit on behalf of some of those employees against their employer under the Fair Labor Standards Act, fund the costs of the lawsuit, and attempt to use the existence of the lawsuit to garner support for its organiza-

tional effort, all without impairing the ability of the attorneys to represent the interests of the employees rather than the interests of the Union?

*Memorandum of Law in Support of Plaintiffs' Motion for Reconsideration*, at 29 (quoting *Order*, at 8-9 (February 21, 1991)). The Court is not of the opinion that this passage constitutes "a controlling question of law as to which there is substantial ground for difference of opinion." The Court's determination of this issue in its Order was grounded in the specific facts of the case, and cannot be divorced from the facts in such a way that it is a "controlling issue of law." Nor is the Court of the opinion that any controlling issue of law in its Order was one over which substantial ground for difference of opinion exists. The law regarding disqualification of counsel is settled law, and the first amendment cases involving unions are also clear.

The Court is also of the opinion that an immediate appeal of the Order is less likely to "advance the ultimate termination of this litigation" than a denial of such an appeal. The disqualification of Baptiste & Wilder does not affect the merits of the plaintiffs' case. The case will therefore presumably proceed to its merits whether an immediate appeal is allowed or not. If immediate appeal is not allowed, the plaintiffs face a delay while replacement counsel familiarize themselves until the case. If an immediate appeal is allowed, on the other hand, the plaintiffs face a delay while awaiting appeal, and a potential further delay for replacement counsel to familiarize themselves with the case if the appeal is unsuccessful. The Supreme Court has held that an order disqualifying counsel is not a final order under 28 U.S.C. § 1291, nor is it reviewable under the collateral order exception to the final order doctrine. *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985). Nothing about the facts or law of this case militate for a departure from the normal requirement that parties await the final determination of their disputes before taking appeal.

Baptiste & Wilder states in its brief that the plaintiffs are having difficulty retaining replacement counsel. The firm states that this is true "because of the restriction of the Court's order inhibiting the selection of labor lawyers and the plaintiffs' lack of funds to pay an

attorney an advance retainer." *Memorandum of Law in Support of Plaintiffs' Motion for Reconsideration*, at 30. In its Order disqualifying counsel, the Court cautioned the plaintiffs to "avoid selecting counsel who will be subject to the conflicts of interest that have merited the disqualification of Baptiste & Wilder." *Order*, at 23 (February 21, 1991). Such a description does not extend to all labor lawyers. The plaintiffs are free to hire labor lawyers who do not have the Union as a client. And to the extent that the plaintiffs, none of whom claims to be indigent, may not have sufficient funds to pay an attorney an advance retainer, they merely face the dilemma that all civil litigants face; whether the relief sought in a lawsuit is worth the cost of maintaining the lawsuit. Neither of these concerns convince the Court that an immediate appeal would advance the ultimate termination of this litigation.

## CONCLUSION

For the reasons stated above, the plaintiffs' motion for reconsideration is DENIED, and the plaintiffs' motion for certification for immediate interlocutory appeal under 28 U.S.C. § 1292(b) is DENIED.

The clerk is DIRECTED to send a copy of this Order to local counsel for the plaintiffs, to the law firm of Baptiste & Wilder, to the named plaintiffs Michele Shaffer and Stephanie Brooks, and to counsel for the defendant.

IT IS SO ORDERED.

J. Calvitt Clarke, Jr.
United States District Judge

Norfolk, Virginia
April 3, 1991

# IN THE UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF VIRGINIA
**Norfolk Division**

STEPHANIE R. BROOKS

and

MICHELE SHAFFER,

on behalf of themselves and
others similarly situated,

Plaintiffs,

v. Civil Action No. 90-1607-N

FARM FRESH, INC.,

Defendant.

**ORDER**

On Friday, April 12, 1991, this case was before the Court for its scheduled final pretrial conference. *See* Order on Initial Pretrial Conference, at 2 (December 11, 1990). The defendant, Farm Fresh, Inc., was represented by counsel. The plaintiffs did not appear, nor did counsel appear on their behalf. The Court now makes three rulings, which it sets forth below.

I.

By Order dated February 21, 1991, the Court disqualified the law firm of Baptiste & Wilder from representing the plaintiffs in this case. The Court directed the plaintiffs to secure new counsel, and to report

to the court on their efforts to do so within two weeks of the date of the Order. To date, only one of the named plaintiffs, Michele Shaffer, has responded to the Court's Order in any way. She wrote to the Court on March 7, 1991, and related that she had contacted the offices of seven different attorneys, and had not yet been able to retain new counsel. On March 13, 1991, Ms. Shaffer related to the Court in an affidavit essentially the facts she had related in her letter to the Court of march 7. She also stated that "[m]ost of the attorneys I talked with who refused to take the case over the phone said they could not handle the case because they didn't know anything about this area of the law, that the case was imply too big for them to handle, or that they were simply unwilling to do it without some money to be advanced for the costs and for their time." Affidavit of Michele Shaffer, at 4.

On April 4, 1991, the date set for the attorneys' conference, Ms. Shaffer appeared before the Court and told the Court that she was about to retain an attorney, Robert J. Haddad, to handle her case. On April 11, 1991, Mr. Haddad wrote to the court and related that Ms. Shaffer had decided not to hire him after all. Ms. Shaffer did not appear for the final pretrial conference, and no attorney appeared on her behalf.

A civil litigant in federal court has a statutory right to represent himself or herself. 28 U.S.C. § 1654. The right to proceed without an attorney is, however, an individual right. *Collins v. O'Brien*, 208 F.2d 44, 45 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 944 (1954). The Court is therefore of the opinion that the named plaintiffs may not represent the interests of the opt-in plaintiffs unless the named plaintiffs are represented by counsel. The court therefore ADVISES all of the individuals who have signed consent forms and caused them to be filed with the Court, that unless they appear before the Court on Monday, April 22, 1991, at 9:00 a.m., and show cause why their interests as represented plaintiffs should not be extinguished, the Court will strike their consent forms from the case, and the case will proceed with respect to the named plaintiffs only.

The above instruction pertains to the plaintiff Karen C. Matthews as well. Ms. Matthews was once a named plaintiff in this case. The original complaint, filed on September 6, 1990, was by Stephanie R. Brooks and Karen C. Matthews, "on behalf of themselves and others similarly situated," against Farm Fresh. On September 25, 1990, an amended complaint was filed, in which the name Michele Shaffer appeared in place of the name Karen C. Matthews in the caption of the case. Because of this amendment, the Court considers Ms. Matthews' status to be that of a "consent plaintiff," rather than a named plaintiff. Therefore, she too is ADVISED that unless she appears before the Court on Monday, April 22, 1991, and shows cause why her interests as a represented plaintiff should not be extinguished, the Court will strike her complaint from the case, and the case will proceed with respect to the named plaintiffs only.

II.

At the hearing on April 12, 1991, the defendant Farm Fresh moved the Court to dismiss the claims of the named plaintiff Stephanie R. Brooks. The defendant stated that Ms. Brooks has failed to respond in any way to interrogatories propounded to her on November 9, 1990, and that Ms. Brooks has never appeared for her deposition which was originally noticed on October 18, 1990. On February 21, 1991, the Court ordered the named plaintiffs to seek new counsel and to report to the Court on their efforts to do so. Ms. Brooks has not responded in any way to the court's Order. She did not appear at any of the oral hearings in the case before her attorneys were disqualified, nor has she appeared on her own behalf since. Ms. Shaffer has represented to the Court that she has been unable to locate or contact Ms. Brooks, and believes that Ms. Brooks no longer resides at the address she gave the Court upon filing this action. Ms. Brooks has not notified the Court of any change of address. For the foregoing reasons, and pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, the Court GRANTS the defendant's motion, and DISMISSES the claims of Stephanie Brooks with prejudice for failure to prosecute.

III.

At the hearing on April 12, 1991, the defendant also moved the Court to dismiss with prejudice the claims of the named plaintiff Michele Shaffer, for failure to prosecute. The defendant relied upon Ms. Shaffer's failure to appear for the final pretrial conference scheduled for that day. Because of the unique circumstances of the case, and the court's concern that Ms. Shaffer may not have been fully aware of her obligation to appear on April 12, 1991 for the conference, the Court DENIES the defendant's motion. The Court reschedules the final pretrial conference for April 22, 1991 at 9:00 a.m. Ms. Shaffer is DIRECTED to appear for the final pretrial conference at that time, or her case will be dismissed with prejudice for failure to prosecute under Rule 41(b).

The clerk is DIRECTED to send a copy of this Order to: the named plaintiffs Michele Shaffer and Stephanie Brooks, Karen Matthews, each of the individuals who have filed consent forms in the case, and to counsel for the defendant.

IT IS SO ORDERED.

J. Calvitt Clarke, Jr.
United States District Judge

Norfolk, Virginia
April 15, 1991

# IN THE UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF VIRGINIA
### Norfolk Division

STEPHANIE R. BROOKS

and

MICHELE SHAFFER,

on behalf of themselves and
others similarly situated,

Plaintiffs,

v. Civil Action No. 90-1607-N

FARM FRESH, INC.,

Defendant.

## ORDER

This case was before the Court today for its rescheduled final pretrial conference. *See* Order, at 5 (april 15, 1991). The court advised all of the opt-in plaintiffs that unless they appeared today to show cause why their interests as represented plaintiffs should not be extinguished, the Court would strike their consent forms from the case, and the case would proceed with respect to the named plaintiffs only. *Id.* at 3. None of the opt-in plaintiffs has responded to the Court's Order in any way. Their Consent forms are therefore STRICKEN from the case, without prejudice to their right to pursue their individual claims against Farm Fresh.

By the same Order, the Court dismissed with prejudice the claims of the named plaintiff Stephanie R. Brooks for failure to prosecute, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Thus, the only remaining named plaintiff is Michele Shaffer. Ms. Shaffer appeared for today's final pretrial conference. She read a letter from herself to the Court, which she filed in open court, in which she stated that she had not yet been able to retain counsel to represent her, and that she was unwilling to proceed with the case unless she was represented by counsel. She repeated a request she made by letter to the Court of April 14, 1991, that she be granted more time in which to find legal representation.

The Court first directed the named plaintiffs to retain replacement counsel in its Order of February 21, 1991. Ms. Shaffer has therefore had more than eight weeks to retain new counsel. The Court advised her of the necessity of securing new counsel if she wished to continue to represent the interests of the opt-in plaintiffs. *See* Order, at 2 (April 4, 1991). Because she has not retained counsel, she can no longer represent the interests of the opt-in plaintiffs. *See* 28 U.S.C. § 1654; *Collins v. O'Brien*, 208 F.2d 44, 45 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 944 (1954) (right to proceed without attorney is an individual right). She could pursue her own claims against Farm Fresh without an attorney, but has stated to the Court that she is unwilling to do so because she does not feel qualified to represent herself.

Ms. Shaffer has had ample time to secure legal representation, but has not done so. She is unwilling to proceed without an attorney. She has stated to the Court that she does not know when she would be able to proceed with her case. Letter from Michele Shaffer to the Honorable J. Calvitt Clarke, Jr., at 1 (April 21, 1991) (filed and read by Ms. Shaffer in Open Court). Her case has been pending against the defendant since September 6, 1990, and has not proceeded in any significant way since February 21, 1991. The defendant is entitled to have claims against it either pursued or dismissed. Because Ms. Shaffer is not willing to pursue her claim as it stands today, the Court DISMISSES her claim in this action against Farm Fresh without prejudice to her right to pursue her individual claim, should she retain counsel or decide to represent herself at a later date.

The Court notes that because both Ms. Brooks and Ms. Shaffer have been dismissed, and because Karen Matthews, who was originally a named plaintiff, has become an opt-in plaintiff, no named plaintiff remains to represent the claims of the opt-in plaintiffs. Consequently, even if the Court had not stricken the consent forms of the opt-in plaintiffs, their claims would now have to be dismissed. The dismissal of the named plaintiffs is therefore an alternative ground for the dismissal of the claims of the opt-in plaintiffs.

This action is DISMISSED and is removed from the docket.

The clerk is DIRECTED to send a copy of this Order to: the named plaintiffs Michele Shaffer and Stephanie Brooks, Karen Matthews, each of the individuals who have filed consent forms in the case, and to counsel for the defendant.

IT IS SO ORDERED.

J. Calvitt Clarke, Jr.
United States District Judge

Norfolk, Virginia
April 22, 1991

Supreme Court, U.S.
FILED
NOV 13 1992
OFFICE OF THE CLERK

No. 92-592

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

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FARM FRESH, INC.,
*Petitioner,*

v.

MICHELE SHAFFER, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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### STATEMENT OF THE CASE

A. The instant *certiorari* petition grows out of a lawsuit brought pursuant to § 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), by certain employees of Farm Fresh, Inc. alleging that their employer has violated the FLSA overtime pay provisions, 29 U.S.C. § 207. This FLSA lawsuit was met with three district court orders going to the plaintiffs' representation by legal counsel who also represented Local 400 of the United Food and Commercial Workers ("the Union"),

and to the Union's provision of assistance to the plaintiffs. These orders—which pretermitted the underlying FLSA lawsuit short of the merits—frame the issues presented by the *certiorari* petition.

1. The first of the district court orders at issue came on a motion by the plaintiffs to approve notice to potential plaintiffs of their right to opt-in to this action as provided for in FLSA § 16(b).

The district court denied that motion. In addition, that court ordered "that neither the parties nor the Union, nor anyone acting for them, in their interest, or at their behest, conduct any further activity to attempt to recruit additional plaintiffs in this action until further order of the Court." Pet. App. 3-1.

2. The second district court order in point disqualified the plaintiffs' chosen attorneys. Pet. App. 4-1.

The foregoing order led to a third district court order dismissing the plaintiffs' action when the plaintiffs could not, under the conditions imposed by the district court, secure an attorney. Pet. App. 7-1.

These two linked "disqualification" orders were based on the district court's belief that a conflict of interest might arise between the plaintiffs and the Union as a result of the Union's concurrent efforts to organize the plaintiffs' workplace if Farm Fresh were to offer a confidential settlement of the FLSA lawsuit. Pet. App. 4-10-11.[1]

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[1] The district court acknowledged a substantial identity of interests between the plaintiffs and the Union in that "the plaintiffs' winning the lawsuit would also serve the Union's interests." Pet. App. 4-10. However, in that court's view, the Union's institutional interests might be better served by some kinds of wins than by others:

> If the plaintiffs were to win quickly and quietly, however, through a confidential settlement, for instance, the Union would be unable to take full advantage of the lawsuit in its organizational efforts. [Pet. App. 4-10.]

The district court then speculated that this difference could blossom into a conflict of interest for the plaintiffs' attorneys if the Union

This hypothesized conflict of interests led the district court to instruct the plaintiffs that their attorney must have no professional relationship with the Union and must be willing to handle the case without permitting the Union to provide the plaintiffs any financial assistance. Pet. App. 4-18 & 1-6. When the named plaintiff informed the district court that she could not find an attorney willing to take the case under these conditions and that she was not willing to proceed *pro se*, that court dismissed, without prejudice, her claims and the claims of the opt-in plaintiffs. Pet. App. 7-1.[2]

B. On the plaintiffs' appeal, the Fourth Circuit first took up the district court's disqualification of the plaintiffs' chosen attorneys. The court of appeals held that a disqualification order "rest[ing] on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur" is contrary to the governing federal common law of attorney disqualification. Pet. App. 1-7. Applying this rule of law, the Fourth Circuit determined that the supposed conflict in this case "is much too speculative on the present record to warrant disqualification." Pet. App. 1-9. On this basis, the court of appeals vacated the orders disqualifying the plaintiffs' attorneys and dismissing the plaintiffs' underlying FLSA lawsuit. Pet. App. 1-11.

The Fourth Circuit then turned to the district court's class notice order. The court of appeals stated that it "c[ould] identify no reason for continuing the district court's ban on communication between Shaffer and potential class members." Pet. App. 1-10. The court below,

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were to attempt to pressure the attorneys to resist a confidential settlement. Pet. App. 4-10-11. The district court considered it irrelevant that "Farm Fresh has not yet made any settlement overtures to any of the plaintiffs. . . ." Pet. App. 4-11.

[2] The named plaintiff stated in court that she understood her attorneys' relationship with the Union and that on that understanding she wished to continue with their representation. Fourth Circuit Appendix 138. The district court disregarded this statement.

therefore, vacated the district court's notice order "and remand[ed] with instructions for the district court to approve a balanced notice statement and consent form." Pet. App. 1-11.

## ARGUMENT

The *certiorari* petition raises two exceedingly narrow questions: the first having to do with the proper standard of review for district court attorney disqualification orders where the facts are not in dispute; the second with the application of this Court's ruling in *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), to the facts of this case. In neither regard does the petition even claim there is any conflict or confusion in the lower court law. And, as we now show, in both regards the court of appeals' recision is entirely correct and entirely consistent with this Court's decisions. The *certiorari* petition should therefore be denied.

### I. THE DISQUALIFICATION ORDER.

A. The Fourth Circuit judged the district court's disqualification of the plaintiffs' chosen attorneys against the following standard:

> [D]isqualification of a litigant's chosen counsel for violation of an ethical canon . . . may not be rested on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur. * * * [S]ome stronger objective indicator—even of "likelihood"—than simple judicial intuition is needed to warrant the drastic step of disqualification of counsel. [Pet. App. 1-7.]

Applying this legal standard, the Fourth Circuit "conclud[ed] that even the likelihood of actual occurrence of [the hypothesized conflict stated by the district court] is much too speculative on the present record to warrant disqualification." Pet. App. 1-9.[3]

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[3] In this regard, the Fourth Circuit noted:

> Certainly the district court pointed to no objective indicators that the chain of events it hypothesized *might* occur, were even

Farm Fresh does *not* challenge the Fourth Circuit's statement of the *governing rule of law*. Rather, the Company challenges the court of appeals' *application* of the stated legal rule to the district court's disqualification and dismissal orders in this case. Pet. 8-15. Farm Fresh contends that "[t]he standard of review of an order disqualifying counsel adopted by the Fourth Circuit in prior decisions" was not applied "[i]n the instant case," because "the Court of Appeals ignored the district court's resolution of the factual disputes. . . ." Pet. 14. In particular, Farm Fresh claims a conflict between the Fourth Circuit decision below and *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir. 1978). Pet. 14. The Company's challenge to the decision below suffers from three fatal flaws.

*First*, the decision below faithfully follows *Aetna*. The Fourth Circuit's *Aetna* opinion expressly adopts the stand-

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incipiently underway, or would "likely" occur. The scenario posited by the court instead had simply to assume the complete unfolding of a series of discrete events, no one of which could be more than the basis of speculation at this point: an offer of settlement favorable to plaintiffs which Farm Fresh required be kept confidential; failure of the Union by that time to have organized the Farm Fresh employees; a decision by the Union to influence counsel to reject the favorable settlement in order to further Union interests; and a decision by counsel to default on their ethical obligation in response. [Pet. App. 1-7-8; emphasis in original.]

The court of appeals noted too that "[n]ot only are positive indicators even of the 'likely' development of the hypothesized conflict of interest weak or non-existent, powerful safeguards against its actual development manifestly are present," Pet. App. 1-8, identifying the following safeguards:

> First off, there is the ethical obligation of counsel. That has now been highlighted by Farm Fresh's motion to disqualify which has prompted specific assurances in response. That obligation's force may not be discounted. Beyond that lies the deterrent effect of sanctions—also highlighted by the proceeding—available were counsel nevertheless ever tempted at the Union's insistence deliberately to delay settlement at the expense of its litigation clients. [Pet. App. 1-8.]

ard of review stated by the Fifth Circuit in *Woods v. Covington Cty. Bank*, 537 F.2d 804 (5th Cir. 1976), for cases where a district court has disqualified an attorney on the basis of an alleged conflict of interests. Under that standard, the court of appeals "review[s] disqualification cases as [it] would most other appeals of a judge's findings, applying the 'clearly erroneous' test to issues of fact while carefully examining a District Judge's application of relevant ethical standards." *Woods*, 537 F.2d at 810. Thus, "'[i]n disqualification cases such as this, where the facts are *not* in dispute . . . ,' . . . it is appropriate for [the appellate court] 'to determine whether the District Court's disqualification order was predicated upon a proper understanding of applicable ethical principles.'" *Aetna*, 570 F.2d at 1200, quoting *Woods*, 537 F.2d at 810 (emphasis added).[4]

Citing the passage from *Aetna* quoted immediately above, Pet. App. 1-7, the court of appeals panel here stated that the district court's disqualification order was subject to *de novo* review for the obvious reason that "the facts are not in dispute . . . ," *Aetna*, 570 F.2d at 1200.[5] And, as already noted, the court of appeals then

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[4] The *Woods* standard of review applies in cases such as this, which "present questions of the legal application of specific standards set forth in the Code of Professional Responsibility." *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 619 (11th Cir. 1983). By contrast, where a "particular disqualification decision . . . [is] closely linked to the trial judge's responsibility to supervise the conduct of the case before him . . . [it is] properly reviewed under the abuse of discretion standard." *Id.*

[5] In disqualifying the plaintiffs' attorneys, the district court relied on the following facts: the Union arranged for attorneys, who also represent the Union, to represent the plaintiffs; the Union advanced some of the costs of litigation; and the Union was conducting an apparently unsuccessful organizing drive among Farm Fresh employees. Pet. App. 4-9-11. In addition, Farm Fresh suggests that the district court may have relied upon the contents of Union flyers describing this lawsuit and the fact that duplicate

concluded that the district court's order was *not* predicated upon a proper understanding of the relevant ethical principles. It is, therefore plain on the face of the opinion below that the panel decision in this case is entirely consistent with the *Aetna* decision.

*Second*, the standard of review stated in *Aetna* and in the decision below is undoubtedly the correct standard of review. Where the historical facts are *not* in dispute and where the trial court has held that disqualification is required by ethical principles concerning conflicts of interest, the only standard against which an appellate court can sensibly judge the disqualification order is whether the order was based on a proper understanding and application of those ethical principles. *Aetna*, 570 F.2d at 1200. This is the normal standard of review where a district court has applied a rule of law to uncontested facts.[6]

*Third*, to this point we have indulged the assumption that a demonstration that a court of appeals' panel failed to faithfully follow its own circuit precedents is a con-

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forms were filed for 3 of the 125 opt-in plaintiffs. Pet. 12. None of these facts are contested.

[6] Indeed, it was particularly incumbent upon the court of appeals to insure that the disqualification order here was based on a proper application of the applicable ethical principles. The district court not only disqualified the plaintiffs' chosen attorneys, that court barred the plaintiffs from employing any attorney who represented the Union or who allowed the Union to financially assist the plaintiffs in prosecuting their claims. Pet. App. 1-6. The immediate and intended result of the district court's orders was to infringe the plaintiffs' "First Amendment guarantees of free speech, petition, and assembly [which] give . . . workers the right to cooperate in helping and advising one another in asserting their rights under the [federal labor statutes]." *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 578-79 (1971). The proximate—and we would say foreseeable—result of these orders was the dismissal of the plaintiffs' claims when the plaintiffs were unable to find a legal representative willing to proceed under the district court's conditions.

sideration that militates in favor of a grant of a *certiorai* petition. We would be remiss, however, if we were to conclude without expressly stating that Farm Fresh's assumption in this regard is unsound. *See Davis v. United States*, 417 U.S. 333, 340 (1974). The proper method for resolving an *intra-circuit* conflict is a petition for rehearing *en banc*. In this case such a petition was filed and was denied without a single Fourth Circuit judge voting for rehearing.

B. In addition to claiming that the court below ignored the "standard of review . . . adopted by the Fourth Circuit in prior decisions," Farm Fresh asserts that the Fourth Circuit's decision "flies in the face of the rule set forth in *Anderson v. Bessemer City*[, 470 U.S. 564 (1985)]." Pet. 14. This claim is even more lacking in merit than the claim that the decision below misapplies the Fourth Circuit's own precedents.

In contrast to *Aetna*, which at least is in point, *Anderson* does not involve any issue relevant to the review of attorney disqualification orders that rest on uncontested historical facts. Instead, *Anderson*—like its precursor, *Pullman-Standard v. Swint*, 456 U.S. 273 (1982)—defines the correct level of appellate scrutiny with respect to district court findings regarding the *purely factual question of an employer's state of mind, viz.*, whether the employer made a particular employment decision for discriminatory reasons. The *legal* question addressed below —whether a "disqualification of litigant's chosen counsel for violation of an ethical canon . . . may . . . be rested on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur," Pet. App. 1-7—is qualitatively different from the *factual* question that precipitated the *Anderson* decision. Not surprisingly, then, as the lower courts have recognized, the proper standard of review here is qualitatively different from the "clearly

erroneous" standard that governs the review of district court determinations of questions of fact.[7]

## II. THE NOTICE ORDER.

A. Having determined that the plaintiffs' chosen counsel should not have been disqualified and that the Union's assistance to the plaintiffs in bringing this case was not improper, the Fourth Circuit could "identify no reason for continuing the district court's ban on communication between Shaffer and potential class members." Pet. App. 1-10.[8] The court of appeals, therefore, "vacate[d] the district court's Notice Order and remand[ed] for lower court approval of an appropriate notice statement and consent form." Pet. App. 1-11.

B. In its *certiorari* petition, Farm Fresh challenges the court of appeals' direction that the district court "approve a balanced notice statement and consent form for distribution," Pet. App. 1-11, as being contrary to this

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[7] Farm Fresh describes *Kamean v. Local 363, I.B.E.W.*, 109 FRD 391 (S.D.N.Y.), *app. dism'd.*, 833 F.2d 1002 (2d Cir. 1986), *cert. denied*, 481 U.S. 1024 (1987), as "a case that is analogous to the case at bar in principle" in which the district court found that "disqualification was proper." Pet. 13, n.9. However, *Kamean* did *not* involve *any* question of disqualification. Rather, the district court refused to certify a class in a duty of fair representation case on the grounds that the named plaintiffs and their attorneys had ties to an organization that was demonstrably hostile to the defendant union and that many of the absent class members belonged to the defendant union. The *Kamean* court did *not* prohibit the plaintiffs from being represented by their chosen attorneys.

[8] The court of appeals "review[ed] for an abuse of discretion the district court's Notice Order, which prohibited Shaffer from contacting potential class members." Pet. App. 1-10. In so defining the standard of review with respect to the district court's notice order, the Fourth Circuit relied upon this Court's statement in *Hoffman-LaRoche, Inc. v. Sperling*, *supra*, 493 U.S. at 169-70, that "district courts have discretion, in appropriate cases, to implement [FLSA] § 216(b) . . . by facilitating notice to potential plaintiffs."

Court's decision in *Hoffman-LaRoche v. Sterling*, *supra*. Pet. 16-18.[9] That challenge is insubstantial.

The *Hoffman-LaRoche* Court expressly recognized that the benefits of FLSA class actions "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." 493 U.S. at 170. The court of appeals' ruling quotes and follows this statement of the FLSA's purpose and effect. Pet. App. 1-10. And, the court below properly recognized that this portion of *Hoffman-LaRoche* all but requires the conclusion that the district court order was an abuse of discretion. Thus, there is nothing to Farm Fresh's contention that the Fourth Circuit's requirement of a "balanced notice statement," Pet. App. 1-11, is in conflict with *Hoffman-LaRoche*. There is even less to the Company's contention that the Fourth Circuit's decision denies the district court *any* discretion in "implement[ing] [FLSA] § 216" to "facilitat[e] notice to potential plaintiffs" accorded by the governing law as stated in *Hoffman-LaRoche*.[10]

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[9] *Hoffman-LaRoche* involved claims under the Age Discrimination in Employment Act, 29 U.S.C. § 623. Section 7(b) of the ADEA incorporates the enforcement provisions of FLSA § 16(b), 29 U.S.C. § 626(b), which is the statute at issue here. *See Hoffman-LaRoche*, 493 U.S. at 167-168.

[10] The supposedly "inflammatory and potentially misleading" union literature referred to by Farm Fresh in its defense of the district court's communication ban is quoted in the Fourth Circuit's opinion. Pet. App. 1-5 n.2. This literature is only "inflammatory" in the sense that it encourages Farm Fresh employees to support the Union's organizing efforts and to join the lawsuit as plaintiffs. It is "potentially misleading" only to the extent that one believes Union organization and prosecution of the lawsuit will not materially benefit Farm Fresh employees. It is quite clear that Farm Fresh does not wish its employees to be moved to action in either respect, but the Company's wishes do not provide adequate grounds for denying potential plaintiffs the sort of "balanced notice statement" provided for by the Fourth Circuit. Pet. App. 1-11.

## CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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